EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1319

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of C. K. McINTOSH and JAMES P. BROWN, as Trustees in Bankruptcy of the Estate of A. B. Costigan, Bankrupt

Opening Brief for Petitioners

Upon Petition by Trustees of Bankrupt Estate for Review and Revision of the Decree of the United States District Court for the Northern District of California

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF THE ESTATE OF C. K. McINTOSH AND JAMES P. BROWN, AS TRUSTEES IN BANKRUPTCY OF THE ESTATE OF A. B. COSTIGAN, BANKRUPT

STATEMENT OF CASE.

This is a petition by the Trustees of the estate of A. B. Costigan, bankrupt, for a revision and review under Sec. 24 b. of the bankruptcy act, as amended Feb. 5, 1903. It is for a revision and review of the decision and order of the United States District Court, Northern District of California sustaining the demurrer of the Defendants, the Petaluma Savings Bank et al, to Complainants' amended bill of complaint, on the ground that said amended bill of complaint "does not state a cause of action," and of the final decree, under said decision, decreeing that Complainants take nothing by their said amended bill of complaint, that defendants go hence and for their costs. (See Trans. p. p. 31, 32, 33).

The original bill of complaint and the two subsequent amendments theerto (Trans, p. p. 11 to 24) which constitute the amended bill of complaint, disclose, briefly stated and omitting specific details, that A. B. Costigan of San Francisco, on March 11th, 1903, borrowed from the Petaluma Savings Bank, the sum of Nine Thousand Dollars ($9000.00) for which sum he made and delivered his note to the Cashier of said Bank, D. B. Fairbanks, payable in six months after date with seven (7) per cent interest, and at the same time and at the request and under an agreement with H. T. Fairbanks, President of said Bank, on the 12th day of May, 1903, executed and delivered to said D. B. Fairbanks as security only for the payment of said note, taxes and insurance, several deeds to lands and tenements in the County of Fresno, California, particularly described in the bill of complaint, and as therein averred, on condition that the said lands would be reconveyed and redeeded to Costigan on payment of said note; that Costigan before and up to the time he was adjudicated a bankrupt on Sept. 19th, 1904, was in possession and control of the lands described in said deeds; that said Costigan filed his petition to be adjudicated a bankrupt on the 16th day of September, 1904, and was adjudicated a bankrupt on the 19th day of September, 1904; that three days thereafter, on the 21st day of September, 1904, when title to said lands had vested by operation of law in the petitioners as trustees of the estate of said bankrupt, the said defendants filed said deeds for record with the Recorder of Fresno County; that at the date of said filing for

record they had full knowledge of the insolvency and bankruptcy of said Costigan; that on the 12th of November, 1903, when said note became due and payable and Costigan defaulted in its payment, the defendants with knowledge of facts and circumstances recited in said bill, sufficient to place them on inquiry, and with reasonable cause from such facts to know or believe said Costigan insolvent at that time, still withheld said deeds from record, for ten months after said note became due, and until six days after Costigan had filed his petition in bankruptcy and for three days after he was adjudicated bankrupt; that by reason of these acts and the representations of bankrupt to his creditors and the suppression by Costigan and the defendants of all information as to the existence of these deeds, the other creditors were misled and deceived and gave credit to him and made large loans of money to him and that this failure by defendants to record said deeds for so long a period and the suppression of information in relation thereto gave a false credit to Costigan and operated as a fraud on his other creditors, who are still unpaid; and that within thirty days after said adjudication the trustees filed for record in Fresno County, a certified copy of the decree as required by Section 47 (11) c of the bankruptcy act as amended Feb. 5th, 1903.

ARGUMENT.

The prayers for relief in the original bill and a repetition of those prayers and the recital of additional

prayers in the amendments thereto, which constitute the amended bill, disclose that the character of relief sought is three fold and calls for the exercise of the **summary** powers and jurisdiction of the District Court under Subs. (7), (15), (18), of Section 2 of the Bankruptcy act. These prayers are:

First, that the deeds named be declared adjudged and decreed to be only mortgages executed and delivered only and solely as security, etc. (Trans. p. p. 15).

Second, that said deeds as mortgages recorded by defendant subsequent to the date Costigan was adjudicated bankrupt, were so recorded with knowledge by defendants of the insolvency and bankruptcy of Costigan, and with reasonable cause to believe a preference was thereby intended; and that such deeds as an unlawful preference may be set aside and decreed null and void, etc. (Trans, p. 16).

Third, that the withholding of said deeds from the public records for sixteen months operated as a fraud on the other creditors of Costigan; that the deeds for want of record in order to impart notice are invalid liens on the premises and that the same for such fraud and failure to record may be set aside and cancelled and declared null and void, etc. (Trans. p. 24).

The demurrer interposed by the defendants to this amended bill, is predicated on four grounds.

First, that it does not state facts sufficient to constitute a cause of action, setting forth in the form of argument the reasons. (Trans. p. p. 26 and 27).

Second, that it is ambiguous.

Third, that it is uncertain.

Fourth, that it is unintelligible. (Trans. p. p. 28 and 29).

The District Court sustained this demurrer on the first ground alleged in the demurrer. (Trans. p. p. 31 and 32).

These petitioners for revision and review contend that there is manifest error in the decision and decree of the District Court in sustaining the demurrer on the ground that the complainant's amended bill does not state a cause of action and on the pleadings only entering its final decree in favor of the defendants. (Trans. p. p. 5 and 6).

Preliminary to pointing out the manifest error in holding that this amended bill does not state a cause of action, it is proper to recite the several sources of power and jurisdiction conferred by law on the District Court, and from the definition and elucidation of those provisions by the Supreme Court, arrive at a correct conclusion as to what facts stated in the bill of complaint give it jurisdiction to adjudicate the questions presented.

The District Court has two sources of power and jurisdiction, the one summary under Sec. 2 (7), (15), (18), the other plenary under Sec. 23 b. bankruptcy act as amended Feb. 5, 1903.

Under the bill of complaint we were in the form of a plenary suit invoking the summary jurisdiction of the District Court.

This we had the right to do. Neither Congress nor the General Orders in Bankruptcy, adopted by the Supreme Court, prescribe any form of pleadings in Bankruptcy proceedings. The Supreme Court in the recent case of Whitney vs. Winman et al., 14 Am. Bk R. at p. 51, hold that the summary jurisdiction of the District Court may be exercised in a plenary suit under a bill in equity, where the property, as in the case at bar, has come into the possession of the bankruptcy court, subject only to a determination of the validity of liens thereon.

It will be borne in mind that for the purposes of this demurrer the allegation that the bankrupt was at all times in possession of the premises, is admitted to be true and the law (Sec. 70, Bankruptcy act) vests title in and gives possession to the trustees at date of adjudication, Sept. 19th, 1904, and, therefore, this property is in custodia legis and subject to the summary jurisdiction of the District Court under Sec. 2 (7).

Under Sec. 6, of the bankruptcy act of 1841, which contains provisions similar to Sec. 2 (7) of the act of 1898, the Supreme Court in Exparta Christy 3 How at page 314 held, "that while the District Court under Sec. 8 of that act had jurisdiction at law and in equity concurrent with the Circuit Court, the form of the bill did not deprive it of the summary power it possessed under Sec. 6, as that act prescribed no particular form of pleading in bankruptcy proceedings."

The District Court in the case at bar, therefore, under a bill in equity has summary jurisdiction to determine controversies in relation to this property.

The first facts alleged in complainant's bill show that these deeds are simply mortgages and the first prayer of the bill is, that they be decreed to be mortgages.

This is an allegation of fact in relation to property in custodia legis, admitted by the demurrer and over which the District Court has summary jurisdiction.

If, therefore, the District Court had jurisdiction to decree these deeds to be simply mortgages, the bill of complaint did state a cause of action and the demurrer thereto should have been over-ruled and denied.

It has been so repeatedly decided by the Federal Courts that Courts of Bankruptcy have summary jurisdiction to determine the extent and validity of mortgage liens on the property of bankrupts, that it has long since passed beyond the domain of controversy and contention. And it makes no difference whether the property covered by the mortgage is within or beyond the territorial limits of the Courts jurisdiction. The property passes to the trustee subject only to a valid lien.

Markson vs. Heany, 1 Dillon 501.
Exparta Christy 3 How at p. 308.
In re Kellogg 10 Am. Bk. R. at p. 11.
Chauncey vs. Dyke Bros. 9 Am. Bk. R. 447.

It is unnecessary to multiply the decisions by citing the numerous cases under the present law.

The exercise of the summary power and jurisdiction over property subject to mortgage and other

liens, is illustrated in the sales made by the trustee of such property upon the order of the District Court, in the many cases cited in Loveland on Bankruptcy (2 Ed.) Sec. 256, Collier on Bankruptcy (5 Ed.) p. 570.

Sec. 2924, Civil Code of California, provides that "Every transfer of an interest in property other than in trust made only as a security for the performance of another act is to be deemed a mortgage."

Sec. 2925, Civil Code, provides that for the purpose of showing such transfer to be a mortgage it may be proved though the fact does not appear by the terms of the instrument.

Sec. 2927, Civil Code, provides that a mortgage does not entitle the mortgagee to the possession of the property.

It will be seen from these averments of fact in the bill of complaint, admitted by the demurrer and elucidated and explained by the law and the decisions recited, that the bill of complaint in this respect did state facts sufficient to constitute a cause of action, and that the court had summary power and jurisdiction to decree these deeds simply mortgages as prayed for and should have over-ruled the demurrer.

It has been repeatedly held by the Federal Courts, under past and present bankruptcy acts, that proceedings in bankruptcy are in the nature of equity proceedings.

It is a settled rule in equity pleading that "a demurrer to the whole bill must be over-ruled if any part of it is sufficient."

Atwell vs. Ferrett, 2 Blatch 39.
Fed. Case, No. 640.
Heath vs. Erie R. R. Co. 8 Blatch 348.
Brandon Co. vs. Prime 14 Blatch 371.
Livingston vs. Story, 9 Pt. 632.
Whitenack vs. Phil. R. R. Co. 57 Fed, R. 901.

Under our second and third prayers for relief, our contention is that the District Court has summary jurisdiction to determine all controversies in relation to said real estate, the same being in the actual or constructive possession of the trustees and therefore in custodia legis.

Mueller vs. Nugent, 7 Am. Bk. R. 234. 184 U. S. 1.
White vs. Schloerb, 178 U. S. 542.
In re Leed's Woolen Mills 12 Am. Bk. R. 136.
Brandenberg on Bankruptcy, Sec. 577.
In re Reynolds 11 Am. Bk. R. 758.
In re Gibbs 4 Am. Bk. R. 619. 103 Fed. R. 782.
In re Gutnam and Wenk 8 Am. Bk. R. 253.
Whitney vs. Winman, 14 Am. Bk. R. at p. 51.

UNDER SECOND PRAYER FOR RELIEF.

The allegations in the bill of complaint which apply to the second prayer, are covered by the provisions of Section 60 a. b. of the bankruptcy act relating to,

Voidable Preferences.

One of the objects of this bill, though not the only one, is to have these deeds, absolute on their face, but

admitted to be given as security for a debt, declared and adjudged to be an **unlawful preference** under the provisions of Section 60, a, and b, of the Bankruptcy Act, as amended February 5th, 1903.

It will be seen that the allegations of the bill under this head embrace all the essential and necessary averments required by Section 60, a and b, as amended February 5th, 1903, in relation to preferences which **shall be voidable** by the trustee, and under which "he may recover the property."

The defendants make the mistake in assuming that this suit is predicated solely and only on a fraudulent transfer, as covered by Section 67 e or Section 70 e, and that the suit is, therefore, limited in its scope and in the rights and remedies given to the Trustees, by those provisions in Section 67, e, and Section 70, c, of the Bankruptcy Act. In other words, that they must proceed under Section 67, e, and 70, e, and the limitations and specific provisions imposed by the laws of this State in relation to fraudulent transfers, and by the State law, governing the rights of liens and judgment creditors, touching the recording of conveyances and mortgages of real estate.

That this assumption is erroneous and contrary to the express provisions of the bankruptcy law, is apparent, not only from the language of the respective Sections 60, 67, a and d, and 70, applicable to several heads of this case, but is clearly indicated in the latest decisions by the Federal Courts in their elucidation of this provision in Section 60, and 67, a and d, relat-

ing to recordation of the instrument conveying the property or creating the lien.

Prior to the amendment of February 5th, 1903, under which the date of the **transfer** and not the date of **recording,** was made the date of the preference, the contention of defendants as to the date of the preference might have been correct, and the Trustees might not have maintained a suit under Section 60, a and b, **subsequent** to four months from the date of the transfer, but could only proceed under Section 67, e, within four months, or under Section 67, a, under the limitations there imposed, or under Section 70 under the limitations and the State law in regard to fraudulent conveyances.

That part of the amended bill which alleges an **unlawful preference,** and contains other allegations required under Section 60, a and b, needs only to be analyzed by the express language of these subdivisions of Section 60.

From the language employed, and applying the fundamental rule in the construction of remedial Statutes, to-wit, the old law, the mischief and the remedy, it is quite plain that the **preference** was given on September 21st, 1904, for a debt contracted May 11th, 1903, due November 11th, 1903. We will give the language of Section 60, a, as applied to a transfer:

"A person shall be deemed to have given a preference, if, being insolvent, he has within four months before filing the petition * * * made a transfer of any of his property, * * Such period of four

months shall not expire until four months after the date of the recording or registering of transfer, if by law, such recording or registering is required."

To what do the words, "such period of four months," refer? Clearly to the words "given a preference" found in the preceding part of the section.

As I shall presently demonstrate, such recording is **required by law.** It cannot alter or affect the provisions of the section whether its recordation is limited to certain objects and for certain purposes by State law. If its recordation is required **for any purpose,** it must be said that it is "required by law," and for the purposes of a **preference** or its legality under Section 67, a and d, these sections make no exceptions.

Neslin vs. Wells, 104, U. S. 428.

Can the object and intent of Section 60 be defeated by withholding from the records such conveyance, until **after** the petitioning debtor has been adjudicated insolvent and a bankrupt? Certainly Congress did not intend to grant any such immunity to those who recorded **subsequent** to the adjudication, when **title** to and possesion of all the bankrupt's property had vested in his trustee by operation of law, as of that date (Section 70) unless it recognized the correctness of the contention, that title at that date **vested** in the trustee as to all property claimed under an unrecorded instrument. The Federal Courts in some of the cases I shall cite, in which the instrument of transfer was recorded **after** adjudication, have held such recordation to be an unlawful preference.

The date of the deeds and the date of the debt is May 12th, 1903; the date of recording the deeds is September 21st, 1904, about sixteen months after the debt was incurred, ten months after the debt became due, and three days after the debtor, A. B. Costigan, was adjudged **insolvent** and a bankrupt by the judgment and decree of the District Court. Hence, we see, that the preference was given on September 21st, 1904, for an **antecedent debt**, existing since May 11th, 1903, and **over-due ten months.**

It is quite evident that Congress in incorporating this provision into Section 60, by amendment, imposed this disability of an unlawful preference on **secret transfers** of property, the title to which was on the public records and, which, like money and chattels, could not be pledged or transferred by simple delivery in satisfaction of, or as security for, a debt, but would by such public record give a false credit and mislead creditors in their dealings with the insolvent debtor.

The conclusions reached by the Federal Courts in their construction of Section 60 since the amendment of February 5th, 1903, are in harmony with these views:

In the case of English, Trustee, etc., vs. Ross (15 Am. Bk. R. 371), Judge Archibald of the U. S. Dist. Court, Middle Dist. of Pa., in a very able review of all similar cases arising under that section prior to the amendment of February 5th, 1903, points out the distinction between those arising before that amend-

ment, and those arising subsequent, and, in a case similar to the case at bar, expressed an opinion and rendered a decision in harmony with our contention.

The following decisions of Federal and State Courts are in harmony with these views:

Tolman v. Humphry, 12 Am. Bk. Rep. 62 to 65.
Babbett v. Kelley, 9 Am. Bk. Rep. 335.
In re Matthews vs. Hordt, 9 Am. Bk. Rep. at p. 383.
In re Pekin Plow Co., 7 Am. Bk. Rep. 369.
In re Pease, 12 Am. Bk. Rep. at page 72 and 73.
In re Klingaman, 4 Am. Bk. Rep. 256.

The United States District Court, Southern District of Iowa, in construing the law with relation to the time, when an unlawful preference was "committed" under Section 60, held, that, the provisions of Section 3 must be considered in reading Section 60: Also held (See page 258) "It was the purpose of this enactment to declare generally that, with respect to acts of bankruptcy consisting of making transfers of property when insolvent with intent to give a preference, the act is to be held **to have** been **committed** when the transfer is made **effectual** as against other creditors by **recording** or registering the instrument of transfer." In re Klingaman cited supra.

"Under the provisions of the Code of Iowa, the failure to record the contract of purchase did not affect the validity of the equitable lien as between the parties thereto, and that as no **subsequent** lien had been obtained against the same up to date when

possession was taken, August 1st, 1899, the lien was effectual as against third parties by the act of taking possession. But the pivotal question **under the bankrupt act is,** when did this transfer take effect as against creditors in the sense that thereby a preference was given to Luthy & Co"? The Court then holds, that, **the preference was given August 1st, 1898, date of taking possession,** and not June 17th, 1898, **the date the agreement of transfer was made.**

Although this decision was rendered before the amendment of February 5th, 1903, it reads into Section 60, the provisions in Section 3, relating to date of recording, a provision now contained in Section 60.

In the case of Landis v. McDonald (88 Mo. App. at page 348), quoting Judge Shiras in the case of Klingaman, cited supra, the Court holds, that, the **preference** dates from the time the instrument of transfer is recorded, and states:

"It makes no difference how valid the mortgage is under the State law, if it is in violation of the specific provisions of Section 60, relating to voidable preference, the mortgage is deemed **a preference,** which may be avoided and set aside by the trustee."

Loveland on Law and Procedure in Bankruptcy (2nd Ed.) p. p. 593 and 594, and notes.

Wager v Hall, 16 Wall, 484.

It is well settled, that the present law, unlike former Acts, does not make the **intent of the bankrupt** necessary to make an unlawful preference.

Black on Bankruptcy, 204 and cases cited.

Under 3rd Prayer for Relief.

Our next ground to determine the **validity** of these admitted mortgage liens is under Section 67, a, which provides, that liens, "which for **want of record or for other reasons,** would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

Par. d of this section, clearly indicates, that liens are not valid which are accepted:

1st, "in fraud upon this Act",

2nd," which have not been recorded according to law, if record thereof was necessary **in order to impart notice.**"

The complainants bill recites the facts and not mere conclusions of law. These facts as recited show that the deeds were executed May 12th, 1903, and withheld from record until September 21st, 1904, three days subsequent to the adjudication of A. B. Costigan, **insolvent and a bankrupt,** and with knowledge by defendants of said bankruptcy and insolvency.

In paragraphs V and VII of the complainant's original bill (Trans. p. p. 14 and 15), and in par. VI and IX of the amendment thereto (Trans. p. p. 23 and 24) it is alleged "that, the failure to record said deeds misled, and thereby operated as a fraud upon the other creditors of the said A. B. Costigan, who extended and gave credit to him subsequent to

the said 12th day of May, 1903, and prior to the recording of said deeds," and recites facts and circumstances to show the knowledge of defendants and their suppression of information in relation to the existence of these deeds.

Upon these allegations in the bill and under the law applicable to them we have three contentions:

1st. That under the law of this State as under the law of almost every State in the Union, the recordation of deeds and mortgages of real estate is "necessary" for the purpose of "**imparting notice.**"

2nd. That three days before said deeds as mortgages were put on record, **title** to and possession of all the lands described in said deeds had **vested by operation of law in the trustees of the bankrupt's estate,** and that such **title** could not be affected or **divested** by the simple act of a **subsequent** recordation of a mere lien.

3rd. That it was "a fraud upon the act" to withhold the deeds from the public records for almost **one and a half years** after delivery, and for **ten months after debt due,** with the alleged knowledge of facts by defendants, sufficient to put an ordinarily prudent man on inquiry, and thereby mislead and injure other creditors by giving a false credit to the bankrupt.

Our first contention that the recording of these deeds, was, in the language of Section 67, d, **"necessary in order to impart notice,"** is settled by the decision of the Supreme Court in Neslin vs. Wells, 104

U. S. 428, and English, Trustee vs. Ross, 15 Am. Bk. Rep. at p. 378.

In those States where the provisions of the law relating to recording deeds and mortgages of real estate are almost identical with the law of this State it has been held that the object of all recording laws is, "to impart notice." Chief Justice Marshall in Bailey vs. Greenleaf, 7 Wheat, 46.

Section 1213, Civil Code of California, shows that recording is "necessary" in order to give notice of the character of title claimed.

Section 1214, Civil Code of California, provides, "every conveyance of real estate * * is void as against any subsequent purchaser or mortgagee of the same property, * * in good faith and for a valuable consideration, whose conveyance is first duly recorded, and **as against any judgment affecting the title,** &c.

Section 1908, Code of Civil Procedure of California, "the effect of a judgment or final order in an action or **special proceeding,** before a Court or Judge of the State or of the **United States,** &c., * * * is as follows:

In case of a judgment or order against a **specific thing** or in respect to * * * the personal, political or legal condition, etc., of a particular person, the judgment or order is **conclusive upon the title to the thing** * * or the condition or relation of the person.

First then, under the requirements of Section 67, a and d, which pronounce invalid those **unrecorded liens,** where "record is necessary in order to impart notice," and the decisions of the Federal Courts in passing upon these provisions, we contend that the recordation of these deeds, was "**necessary**" in order to "**impart notice,**" that not having been recorded **prior** to September 19th, 1904, the date that A. B. Costigan was adjudicated a bankrupt, that title on that date without notice and therefore free from incumbrance, vested in the trustees under the specific provisions of Section 70, which provides, that the trustee of the bankrupt's estate shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, etc., to all, * * *

"Property which prior to the filing the petition he could by no means have transferred" * * *

The admitted allegations of the bill show that the bankrupt filed his petition on the 16th day of September, 1904. Therefore at any time prior to that date he could have transferred said property by deed.

We have no right under this specific provision of the law, with no provisos or expressed exceptions, to **assume** that when such a transfer had been made by the bankrupt, these defendant grantees would have placed their respective deeds on record, before the recordation of a subsequent transfer made by the bankrupt.

The judgment of this Court on the 19th day of September, 1904, adjudicating A. B. Costigan a bank-

rupt, embraced all the elements, and imposed on the bankrupt **and his property** all the conditions contained in the bankruptcy act, and one of these was the **vesting of title** to and possession of all his property in the Trustees, and the disabilities named in Section 67, a, d.

In order to vest this title, it was not necessary as it was under the act of 1867, for the Judge or Register (now Referee) to execute a deed of assignment to the trustees, but title vested, "co-instanti." No conditions are imposed by Section 70 to vest this title. It vested subject to the specific provision of Section 67, a and d. It does not require the recordation of any **instrument of conveyance** in the county where the lands are situate, before title vests; and the allegations of the bill show that the defendants had actual knowledge of the bankruptcy and insolvency of A. B. Costigan at the time they recorded the deeds. The law not only presumes that they had knowledge of the effect of the adjudication of bankruptcy upon the title to said property, but the Supreme Court of the United Sates, and other Federal Courts, have repeatedly held, that the filing of the petition by the bankrupt "was a **caveat** to all the world, and was," in effect an atachment and injunction.

Bank vs. Sherman, 101 U. S. on p. 405.

Meuller vs. Nugent (U. S. Supreme Court) 7 Am. Bk. Rep. p. 234.

And from the date of adjudication, it has been held in many cases under the present act, it is a sequestration of all the bankrupt's property.

From these provisions and decisions, it is apparent, that when the defendants placed these deeds on record, they did so with actual or constructive notice that title and possession by such adjudication had vested in the trustees and that the disabilities of Section 67, a and d, were imposed on their lien; that such judgment was conclusive upon the title to the property as provided in section 1908, Code of Civil Procedure of California, and that the "caveat" and "injunction" created by the proceedings in bankruptcy, made any interference with the title or possession of the trustees or with property in the custody of this Court, subsequent to that date, an illegal and void act on the part of defendants under the provisions of the bankrupt law as elucidated by the Federal Courts.

The provisions of Section 67, a and d, are not found in any previous bankruptcy act, so that decisions under the act of 1841 and 1867, with relation to the character of the title which passed to the trustees, and decisions under the present law predicted on those made under former acts, or looking only as they do at the provisions of Section 70, and not considering the entirely new provisions of Section 67, a and d, have no application to the limitations and disabilities created on liens, and the right and title passing to the trustee under Section 67, a.

In re Thorpe, 12 Am. Bk. Rep. p. 199.
In re Pekin Plow Co., 7 Am. Bk. Rep., at page 373.

It has been too frequently decided to admit of contention, that the trustee represents the creditors and is not confined to rights which were vested in or may be taken advantage of by the bankrupt.

It cannot be said that the State law or State decisions can control, modify or limit the express provisions of the bankruptcy act. So far as they do not conflict, it is settled by the highest judicial authority that the State law and decisions governing property rights shall be followed, but where Congress in the exercise of its Constitutional powers makes any other or different provision in enacting a uniform system of bankruptcy, that provision must prevail.

Section 409, Code of Civil Procedure of California, provides for filing notice of the pendency of certain specified actions, in which the petition in bankruptcy, is not embraced; it then provides, that, "from the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

This provision does not and cannot apply to a petition in bankruptcy, as will be seen by a reference to its language. The bankruptcy act does not require the petitioner to perform such an act for "giving notice," and the Supreme Court and other Federal Courts under prior and present bankruptcy acts, have held, that, the filing of the petition is a "caveat to all the world, and an injunction," and that

adjudication operates as a sequestration of the bankrupt's property.

The Supreme Court of the United States in the case of Bank vs. Sherman, 101 U. S. at page 406, in passing upon property rights and the bankruptcy act of 1867 said: The filing of the petition was a "caveat" to all the world. It was in effect an attachment and injunction. On page 405: "The assignment (to the assignee in bankruptcy) related back to the commencement of the proceedings which was by filing the petition on the 23rd day of February, 1875, and the title of the assignee to all the property and effects of the bankrupt became vested as of that date."

The Supreme Court in Meuller vs. Nugent, 7 Bk. Rep., at page 234, says: "It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction, and on adjudication, title to bankrupt's property became vested in the Trustee, (Section 70, 21 c), with actual or constructive possession, and the property placed in the custody of the bankruptcy court."

The vesting of title by operation of law through the **judgment of insolvency and bankruptcy** entered against the bankrupt is certainly not a "conveyance" which may be recorded, but a "judgment" as shown by the recitals in Section 1214, Civil Code of California, and under which judgment title may vest by operation of law as provided in Section 1971, Code Civ. Pro. of Cal.

Now, as Section 409, Code of Civil Procedure, when read with Section 1214 of the Civil Code, provides that the filing of notice of **lis pendens** prior to the recordation of any conveyance of the same property shall render the latter void as against the subsequent **judgment affecting the title**, it follows, that the provisions of the bankruptcy act, and the decisions of the Federal Courts, that the filing of the petition operates as a caveat to all the world and an injunction against all persons; in other words, a notice to all the world and a restraint upon all persons seeking to interfere with the title or possession, fulfills the requirements of **notice of the pendency of action**, which by the subsequent **judgment** prior to the recordation of defendant's deeds, impressed such deeds with the disability named in Section 1214, and made them void as against the judgment of the District Court adjudicating A. B. Costigan a bankrupt.

It cannot be said, that all the provisions of a State law, and all the decisions of its courts must be followed in order to effect title to property. The State law provides **the manner** of transferring and conveying title to real estate, not confining it to deeds of conveyance, but embracing a provision for title vesting by operation of law (Sec. 1971, Code Civ. Pro.). No one questions the power of Congress by the provisions of the bankruptcy law, nor the power of its Courts in elucidating that law, to prescribe and determine what shall constitute a notice equivalent to that prescribed in Section 409, Code of Civil Procedure of California.

If it were necessary many decisions by the Federal Courts could be cited in which the provisions of the bankruptcy law, and the absence of applicable provisions in the State law, imposed on them the judicial duty of prescribing a different rule in property rights, than those fixed by State law, and judicially determined by State Courts.

But while the provisions of Sec. 409, Code of Civil Procedure of California, is a rule of action for State **Courts,** it does not effect title or rights or liens acquired by the judgment or decree of Federal Courts.

In the case of Restherglen vs. Wolf et al. (Federal Case No. 12,175) the Circuit Court for the E. D. of Va., held, that a lis pendens in a U. S. Court binds property in litigation **though not recorded and docketed** as required by State law if in a State Court.

To the same effect are the following cases, in which the filing and recording of notice of **lis pendens** is required by the State law, but the Federal Courts held, that this requirement only applies to cases pending in the State Courts.

U. S. vs. Humphreys, 3 Hughes 201, Federal Case 15,422.

Shrew et al. vs. Jones, Federal Case No. 12,818.

"The adjudicating of bankruptcy was equivalent to the commencement of an action and the **filing of lis pendens."** In re Kellogg, 10 Am. Bk. R. at page 12, line 30.

It must be remembered in the consideration of the case at bar, that it is not a question of the **priority**

of liens, the one predicated on an unrecorded mortgage, and the other on a general judgment operating only as a lien, but that the question presented by the admitted facts is, whether title once vested in trustees, by a judgment in rem, (as distinguished from a judgment that simply creates a lien) can be divested or impaired and destroyed by a subsequent recordation of the mortgage lien.

This title is vested in the trustees for the benefit of the creditors, and as the Federal Courts here repeatedly held, the trustee takes and is invested with more than the rights and titles of the bankrupt.

They are invested with every right and secure in every title, with which any creditor could have been invested or secured by a judgment giving such creditor title "by operation of law" before the mortgage lien had been recorded. Can it be said that if this judgment of Sept. the 19th, 1904, had vested title in a creditor of A. D. Costigan, that such title "by operation of law," created by such judgment, could have been divested or impaired by recording this mortgage lien three days subsequent thereto? If so, what becomes of the provision of Sec. 1214, Civil Code of California, which declares such unrecorded mortgage void "as against any judgment affecting the title"? And if a mortgage, thus withheld from record for sixteen months, may be recorded three days after title vests under a judgment, why may not a mortgage withheld from record for five years be recorded five years after vesting of title in a trustee in bankruptcy or in any one securing title by operation of

law? Sec. 67 of the bankruptcy act, prescribes no period of limitation, therefore to favor the short and disfavor the long period would be simply "judicial legislation."

That these contentions on behalf of the vested rights of the trustees under Sec. 67, a and d, are justified by the latest decisions of the courts, State and Federal, in their construction of that section, the following authorities will show:

In re Lukens 14 Am. Bk R. 683. 138 Fed. R. 188.

In the case of Lukens, just cited, Judge McPherson held that "a mortgage recorded or unrecorded is a mere security for money and gives a lien but not an estate in the ordinary sense of the word; that Section 67 a of the bankruptcy act, states an exception to the rule that the trustee takes no better title than the bankrupt himself possessed; and it states such an exception because it forbids the holder of an instrument who might have had a lien if he had recorded it before bankruptcy to acquire such a lien by recording it afterward." * * *

"It seems to me that Congress intended to say **inter alia** to such creditors, if from lack of diligence you have failed to record your mortgage before the beginning of bankruptcy proceedings, you shall not acquire a lien afterwards although you do record it then."

The decision of Judge McPherson relates to a mortgage on real estate in the State of Pennsylvania

where the provisions of the recording acts do not differ materially from Sec. 1214, Civil Code of California, as will be seen by reference to his decision.

In California as in Pennsylvania, it is the settled doctrine that a mortgage is a mere security for a debt and passes only a chattel interest; that the mortgage constitutes simply a lien or incumbrance, and that the land subject only to this lien, may be sold and conveyed by the mortgagor.

McMillan vs. Richards, 9 Cal. 365.
Carpenter vs. Brenham, 40 Cal. 221.
Bludworth vs. Lake, 33 Cal. 255.
Harp vs. Callihan, 46 Cal. 222.
Tapia vs. Demartini, 77 Cal. 386.
Stewart vs. Powers, 98 Cal. 514.

"A deed absolute on its face, but intended merely to secure an indebtedness of the grantor to the grantee, is a mortgage and does not convey the title to the land." Moesant vs. McPhee, 92 Cal. 76.

Farmer vs. Gross, 42 Cal. 169.
Lodge vs. Turman, 24 Cal. 385.
Montgomery vs. Speet, 55 Cal. 352.

"A deed absolute on its face, given to secure payment of a promissory note, is a mortgage and does not convey title nor give the right to possession of the mortgaged premises to the mortgagee," Raynor vs. Drew, 72 Cal. 307.

The case of Lukens, cited supra, it will be observed is analogous to the case at bar. It relates to a deed

or mortgage of real estate recorded after adjudication of bankruptcy, and therefore after title had vested in the trustee by operation of law. In the large number of cases arising under the same provision of the law, it will be found that the instrument of transfer or mortgage was recorded before adjudication and **before** title had vested in the trustee, but within four months of such adjudication. In such cases it was not the divesting or impairment of a vested title by recording a simple mortgage lien, but a conflict as to the rights of **simple contract creditors** under State laws, in their assertion of title in the trustees against a mortgage or other lien recorded **before** the bankrupt filed his petition or was adjudicated a bankrupt.

But in all the cases having all or a part of the essential elements apparent in the case at bar, the decisions have been in harmony with the late case of Lukens cited supra.

In re Thorp, 12 Am. Bk. R. 195.
In re Booth's Estate, 98 Fed. 976.
Chesepek Shoe Co. vs. Seldner, 122 Fed. R. 593.
In re Shirley, 7 Am. Bk. R. at p. 302.

It is apparent from the law of California that the recordation of these deeds is "necessary for the purpose of imparting notice."

Sec. 1213, Civil Code Cal.
Sec. 1171, Civil Code Cal.

In Cady vs. Purser, 131 Cal., the Supreme Court held (at page 556): "If the grantee of an interest

in lands would protect himself against subsequent purchasers or incumbrancers he must **give notice** of his interest, and as the Statute provides for constructive notice instead of actual notice, it is incumbent on him to comply with all the requirements prescribed for such constructive notice, one of which is the correct transcription of the instrument into the appropriate book."

And at page 557: "When the recording of the instrument is the means by which his ultimate purpose is to be carried into effect, as when **his purpose** is to give notice of his **interest** in real estate, Section 1213, Civil Code, requires not only that the instrument shall be filed with the recorder for record, but also that it shall be "recorded as prescribed by law."

In this case the Court held that where the mortgagee failed to properly record his mortgage until **after** a third person had **acquired an interest** in the land it was void as to such third person. (See at page 559.)

At page 560: "A title may be paramount and superior to the title of the mortgagee, although acquired **after the date of the mortgage.**" The provisions of Section 1214, C. C., by which the failure of the mortgagee to record his mortgage renders it void as against subsequent purchasers and mortgagees, deprived it of all consideration in **reference to its date,** and required it to be treated as if it had been executed **subsequent** to the record of the **subsequent** purchaser. Being void as against him, neither its date nor its contents can be available to defeat his title."

To the same effect Neslin vs. Wells, 104 U. S. 428.

In Odd Fellows Savings Bank vs. Banton, 46 Cal. 607, the court citing Sections 1213-1214 and 1215, C. C., held:

"It is apparent from these sections that the legislature intended that **all instruments** within the definition of a conveyance, in any manner affecting the title to real property, should be filed for record in the proper Recorder's office, and until so filed should be void as against all persons who subsequently without notice, in good faith and for a valuable consideration, might acquire any interest therein either as purchasers or incumbrancers."

The questions presented by provisions of Sections 67 a and 70, is as to the **vesting of title,** and not to **priority of liens,** as determined by the Supreme Court in Bank of Ukiah vs. Petaluma Savings Bank, 100 Cal., 520. The judgment **vesting title** in the trustee cannot therefore be confounded with a simple **judgment lien.** Nor can that decision, nor the decision in Root vs. Bryant, 57 Cal. 48, that a mortgage lien attaches when the instrument is executed though recorded afterwards, affect the provisions of Section 67, a and d, of the bankrupt law, nor the effect of failure to record as provided in Section 1214 Civil Code. It is doubtless good **between the parties** and as against those who acquire no rights or interests in the premises **prior to recording.**

It is true that Section 47 (11) c, bankruptcy act, provides: "The trustee shall, within thirty days after the adjudication, file a certified copy of the decree

of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution"; * * *

It has been repeatedly held by the Courts, in every State where a period is named in the law within which a deed or mortgage may be recorded, that such deed or mortgage if recorded within that period or on the last day of that period, is good, and the title or lien given by such instrument is not effected or postponed by the prior recordation of any other deed or mortgage wthin, but before the expiration of the period allowed by law for such recordation. In other words, it has been said, that if the law allows thirty days in which to record an instrument, its recordation within that thirty days, relates back to its date, and makes its record effectual from the date of the instrument.

Clark vs. White, 12 Pet. at page 197.

Under this rule, the recording of the decree of adjudication of bankruptcy as alleged in complainant's amended bill makes such recordation effective on the 19th day of September, 1904, three days before defendants filed their respective deeds for record.

In addition to the disability imposed by Sec. 67 a on mortgage and other liens, "for want of record," that section also provides that if such claims **"for other reasons"** would not have been valid liens against the claims of creditors of the bankrupt they shall not be leins against his estate."

We, therefore, contend, under this provision of Sec. 67 a, when read in connection with Sub. d of that section, that we may allege, and have alleged facts in par. V and VII of the original bill (Trans. p. p. 14-15) and par. VI and IX of the amendment thereto of June 24, 1905 (Trans, p. 21 and 22), showing,

Constructive Fraud.

Our contention under this head, embraced in and covered by our 3rd prayer for relief, is, that the defendants have been guilty of constructive fraud; that a deed or mortgage, not at first fraudulent, may afterwards become so by being concealed, or not pursued, by which means creditors are deceived and lend their money or give credit so that a mortgage lien which was not at first fraudulent may become so through such concealment; that added to this is the fact that the deeds did not when made or recorded express the truth, and when such a deception is added to the long concealment, it is generally held to be a badge of fraud, because it affords a convenient cover for fraud upon creditors.

This contention is sustained not only by the provisions of the Code of this State but by the highest judicial authority, in cases analagous to the one under consideration.

Blenerhassett vs. Sherman, 105 U. S. 118 to 122.

This was the case of an unrecorded mortgage under the bankruptcy act of 1867, which did not contain

the specific provisions of Section 67, a and d, and therefore was not as strong a case as the case at bar. In that case the Court held: (See page 118.)

"A deed of trust in the nature of a mortgage, valid on its face and not made or received with any intent to defeat existing or future creditors, may nevertheless be held to be **fraudulent and void** as to all creditors, existing and future, by evidence aliunde, showing the conduct of the parties, &c. The **principal circumstance** relied on in this case to avoid the deed was the fact that the **grantor retained possession** of the property and the deed was withheld from record, and the mortgagor was thereby enabled to contract **debts** upon the presumption that the property was unincumbered, the Court declared that the **natural and logical** effect was to mislead and deceive the public, and induce credit to be given to the mortgagor, which he could not have obtained if the truth had been known, and therefore the whole scheme was fraudulent as to subsequent creditors, as much as if it had been conceived from that motive and for that object."

Page 122: "If the mortgage (on land) had been executed within the period of two months (Act of 1867) next before the filing of petition in bankruptcy, it would have been void under the letter of the bankruptcy act. When all the other circumstances necessary to render it void concur, the device of concealing it until the two months have elapsed cannot save it. It is, notwithstanding the lapse of time a fraud on the

policy and objects of the bankruptcy law, and is void as against its spirit."

Same effect in Hillard vs. Coyle, 46 Miss. 309. Hildeburn vs. Brown, 17 B. Mon (Ky.) 779.

In State Savings Bank vs. Buck, et al., 123 Mo. 141, held: (Under the law of Mo. parties are not required to record their mortgages, except to "impart notice".) "Two deeds, absolute in form were given by Buck to the Bank, one in November, 1884, one in November, 1885, as security for the loan of $9000, value of property $13,000; they were not recorded until November, 1887, two or three years after respective dates. On that date Buck and partner, McCloskey, failed and made a voluntary assignment for benefit of creditors, etc. The Chief Justice, among other things, says: "There is no claim made that the failure to record them was through any oversight or neglect; they were certainly withheld by design, and we cannot escape the conclusion that they were not recorded because of some understanding to that effect. In this the parties were not actuated by any **actually fraudulent purpose** or evil design to injure the creditors of Buck & McClosky.

"The title of a bona fide grantee or mortgagee is good against creditors at large of the grantor or mortgagor though the deed or mortgage is not recorded. A person incurs no penalty for a mere failure to record his deeds, save such conveyances as are provided for by the recording acts; and the mere failure to record a deed or mortgage, is not evidence

of fraud, unless there is an agreement to deceive others, or it has that effect."

"It was held long ago that a deed not at first fraudulent, may afterwards become so by being concealed, or not pursued, by which means creditors are drawn into lend their money."

Citing Hungerford vs. Sands, 2 Johns Ch. 35.

"A deed not at first fraudulent, may become so by being concealed, because by its concealment persons may be induced to give credit to the grantor. In such cases the use that is made of it, relates back and shows the intent with which it was made. The omission to place a deed on record, or leaving it in hands of grantee, &c., to be produced or suppressed accordingly as exigencies may demand, are instances of secrecy that are within the rule."

Citing:

Bump on Fraudulent Conveyances (3 Ed.), page 39.

"There are many cases where the existence of an intent to hinder, delay and defraud is not a question of fact, but is one of law." Every man is presumed to intend the necessary consequences of his act, and if an act necessarily delays, hinders or defrauds creditors, then the law presumes that it was done with a fraudulent intent.

Citing:

Bump on Fraudulent Conveyances (3 Ed.), page 22.
Wait on Fraudulent Conveyances and Creditors Bills (2 Ed.), Section 9.

(The Chief Justice quotes many other cases in Mississippi, Missouri, Wisconsin and England of the same character.)

In conclusion he says:

"In applying these principles of law to the case in hand it is to be observed, in the first place, that these deeds did not, when made or when recorded, express the truth, though a deed absolute on its face may be shown to be a mortgage, still, such a conveyance is generally held to be a **badge of fraud,** because it affords a convenient cover for fraud upon creditors.

"The result of withholding of these deeds from record for the long period was to give defendant a false financial standing and to mislead and deceive the creditors, and the plaintiff must be held in law to have intended that result, though actuated by no fraudulent or evil motive. The deeds must be held fraudulent as to defendants."

To the same effect:

Hildreth vs. Sands, 2 John (N. Y.), Ch. 35.
Scrivener vs. Scrivener, 7 B. Mon. (Ky.) 374.
Bank of U. S. Houseman, 6 Page (N. Y.) 526.
Coats vs. Gerlach, 44 Pa. St. 43.

The case of Neslin vs. Wells, 104 U. S., 428, is strongly in point.

"This case arose in the Territory of Utah, where the law permitted, but did not **require**, the registration of mortgages, but where there was a **general custom** to record such instruments. Neslin, the vendor of land, took from Smith, his vendee, a mortgage to secure a part of the purchase money, but did not file it for record until after a subsequent mortgage executed by the vendee on the same land, to one Kerr, had been filed for record, Kerr having no notice, actual or constructive, of the prior mortgage to Neslin. It was held by the Court, that, "under the circumstances of the case there arose **a duty** on the part of Neslin, the vendor, **to record** his purchase-money **mortgage**, towards all who might become subsequent purchasers for value in good faith, a breach of which duty in respect to Kerr the **subsequent** mortgagee, without notice constituted such negligence and laches **as in equity requires**, that the loss which in consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned."

There are several provisions in the Codes of this State, which are in harmony with, and justify the application of these decisions to the case at bar.

Section 1573, Civil Code. "Constructive fraud consists:"

1. "In any breach of **duty**, which, without an actually fraudulent intent, gives an advantage to the

person in fault. * * * by misleading another to his prejudice, or to the prejudice of any one **claiming under him.**"

It certainly was a breach of duty imposed alike by law and in equity for these defendants to withhold from the records **for so long a period** the secret deeds held by them. I have cited the case of Neslin vs. Wells, where it is held that recording **is a duty** and the provisions of the Code which impose **the duty** of recording in order to **"impart notice."**

Add to this the familiar maxim as old as our jurisprudence, and embodied in our Civil Code, (Section 1963, par. 3) "that a person intends the ordinary consequences of his voluntary act."

See also Loveland on Bankruptcy (2 Ed.), page 580.

In the case at bar as set forth in paragraph VI, VII and IX of the bill, and as held by the Supreme Court of the United States and by the Court in the case of State Savings Bank vs. Buck, et al., cited supra, the ordinary consequence of the defendants voluntary act, was to mislead the creditors of the bankrupt and induce them to give the bankrupt credit.

The rule at law is quite different from the rule in equity.

Judge Story states the rule Vol. I "Equity Jur. Sec. 187," thus: "Fraud in deed in the sense of a court of equity, properly includes all acts, **omissions** and **concealments** which involve a breach of legal or

equitable duty, * * * * * * and is injurious to another, or by which an undue or unconscientious advantage is taken of another."

In the case of Brady vs. Bartlett, 56 Cal. at page 366, the Court says, that, the definition in the Code, Section 1572 and 1573, substantially accord with the rule above stated, and that fraud arises out of a **breach of duty** or obligation.

Sukeforth vs. Lord, 87 Cal. 400.

"A man is guilty of fraud in doing what the law deems fraudulent, although he may not be conscious that he is committing any wrong."

Id. p. 503.

"Even when there is no intention to deceive, there may be such amount of gross carelessness as to constitute conclusive evidence of a fraudulent intent."

Alvarez vs. Brannan, 76 Cal. 503.

In Wager vs. Hall, 16 Wall, at page 601, it is held: "A transfer by insolvent debtor within four months **is a fraud** on the bankruptcy act, and void, * * * Positive proof of fraudulent acts between debtor and creditor is not generally to be expected; the law therefore allows a resort to circumstances as the means of ascertaining the truth," &c.

"Knowledge of a given fact, may be proved by circumstances, even in an ordinary suit." Page 602.

As a summary of our contentions we reiterate, that the allegations of fact in the amended bill were suf-

ficient to constitute a cause of action under the summary jurisdiction of the District Court.

1. To declare these deeds, mortgages, under Sec. 2 (7).

2. To declare the deeds, "an unlawful preference" under Sec. 60, a and b.

3. To declare the deeds, unrecorded at date Costigan was adjudicated bankrupt void, under Sec. 67, a and d.

4. To declare the deeds "constructively fraudulent," and therefore void, under Sec. 67, a and d.

WILLIAM A. COULTER,
Solicitor for Petitioners.

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No. 1319

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of C. K. McINTOSH and JAMES P. BROWN, as Trustees in Bankruptcy of the Estate of A. B. Costigan, Bankrupt

Petitioner's Brief in Reply to Brief for Defendants

Upon Petition by Trustees of Bankrupt's Estate for Review and Revision of the Decree of the United States District Court for the Northern District of California

WILLIAM A. COULTER,
Solicitor for Petitioners

Press of MELVIN, HILLIS & BLACK, 44 West San Fernando St., San Jose, Cal.

IN THE

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Petitioners Brief in Reply to Defendants and Respondents.

Counsel for the defendants and respondents misapprehend, or purposely avoid, the issues presented for consideration and adjudication in the case at bar, and erroneously assume that it is only Sec. 60 of the Bankruptcy act which is invoked, and that one of the essential and necessary elements in a case of voidable preference under that section is fraud.

That section enumerates the several grounds necessary to constitute a voidable preference, and while fraud is not

one of the grounds, it is found in a few cases, but the large majority do not contain that element and are decided alone upon the grounds enumerated in Sec. 60.

Under the first allegation of petitioners bill and the first prayer for relief (trans. pp. 12 to 17) they are entitled to have these deeds decreed to be mortgages.

The bill in this respect states a fact with relation to property in the actual or constructive possession of the trustees, within the custody of the court, and therefore, within the summary powers and jurisdiction of the District Court under Sec. 2 (7) Bankruptcy act.

Our second allegation and the prayer for relief under it is as to a voidable preference under Sec. 60 (Trans. pp. 12 to 17 and 18, 20 to 24.)

Our third allegation and the prayer for relief thereunder appearing in the above transcript and as set forth in our opening brief at pages 16 and 33 is under Sec. 67 a. and d. of the Bankruptcy act, and is on two grounds, the first for failure to record before title had vested in the trustees and the second for constructive fraud.

Let us see by what arguments or evasions counsel for respondents meet these issues and reply to the authorities cited in our opening brief.

The case relied upon by counsel for respondents Meuller vs. Bruss (112 Wis. 406) cited by them on p. p. 1 and 2 of their brief is fired at us without discrimating or designating whether it is to be applied to a voidable preference under Sec. 60 or a void or fradulent lien under Sec. 67.

It will be seen that this was a suit in a State Court brought on the ground of a transfer made by the Bankrupt to hinder, delay and defraud his creditors, not within the

the provisions of Sec. 67 of the Bankruptcy act, but on the alleged fradulent transfer under the State law with only the right of action given under Sec. 70 of the Bankruptcy act.

This case cannot apply to Sec. 60 for Sec. 60 enumerates the several grounds which must be alleged to entitle the trustee to recover and those enumerated in the case cited are not the grounds required by Sec. 60.

Collier on Bankruptcy (5 Ed. 456.)
Western Tie & Timber Co., vs. Brown, 129 Fed. 728.
In re Fort Wayne Elect. Co., 96 Fed. 803.
Brandenburg on Bankruptcy, (3 Ed.) Sec. 947.

The garbled extracts from the bill of complaint made by counsel for defendants (Defendants brief p. 4 to 9) are incorrect, unfair and misleading as will be seen from a full and correct reading of the amendment and par. IX and X of the bill.

In pleading the requirements of Sec. 60 it will be seen from the authorities just above cited, that there is necessarily a mixed averment of law and fact. The necessary averments to meet these requirements of Sec. 60 and in accordance with the authorities just above cite and the precedent contained in Plummer vs Myers, 137 Fed. R. 661, are found in par. VIII of amendment to the bill of complaint (Trans. p. 18) which alleges: "And your orators further allege, that the effect of the transfer of the said real estate so conveyed by said deed of conveyance, will be to enable the said defendants to obtain a greater percentage of the debt due them by the said bankrupt than any other of the bankrupt's creditors of the same class."

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Par. IX and X of the Petitioners bill of complaint (Trans. pp. 22 and 23) disclose that par. X contains an averment which counsel for defendants purposely omitted in ther garbled extracts, and which if frankly quoted, would have destroyed their contention. The first allegation of par. X is as follows:—"Your orators further allege that the said A. B. Costigan at the date he was adjudicated a bankrupt did not own or possess any other property individually not exempt by law, save and except a seat in the Merchant's Exchange of no fixed or definite value and ten shares of stock of the Pacific Motor Car Co., valued at ten dollars; that the real estate heretofore described as conveyed to defendants as your orators are informed verily believe and allege does not exceed in value the sum of ten thousand dollars." Read this par. X, as correctly quoted, in connection with par. IX as recited by counsel for defendants on page 5 of their brief, and it will be seen that the only property owned by the bankrupt at the date he was adjudicated a bankrupt is that named in par. IX and that his indebtedness exceeded this personal property pledged in the sum of Sixty Thousand Dollars; this real estate is named in par. X as worth Ten Thousand Dollars. Hence his indebtedness is Sixty Thousand Dollars and his assets including this real estate is Ten Thousand and Ten Dollars.

We reply to counsel's brief under their second head on page 9 as follows:—

They erroneously assume that a failure to record these deeds under the provisions of Sec. 67 a. and d. must have been done with a fraudulent intent and purpose. There are two grounds under this Section which render the deeds

void; First, the failure to record without any element of fraud; and second where there has been fraud either actual or constructive. It will be observed by reference to Sec. 60, that, the words employed are: "such recording or registering is required." In Section 67 d. the word "required" is not used, but the word "necessary" as follows: —"If a record thereof was necessary in order to impart notice."

The flippant remarks of counsel in relation to the decision of chief justice Marshall in Bailly vs. Greenleaf, 7th Wheat 46, holding, that "the object of all recording laws is to impart notice," and their assertion that the recordation of deeds is *required* by the laws of Utah contrary to the decision of the Supreme Court in Neslin vs. Wells (Defendants brief p. 29) is fully contradicted by a reference to those cases. The Court in the latter case say: "The legislation on this subject prior to 1874, it will be observed, did not require that a mortgage should be recorded in order to be valid, did not in terms declare what should be the legal effect of recording or omitting to record." * * *

"With the general and notorious practice of the people of the territory under those laws, we have no hesitation in deciding, that under the circumstances of the case, there was a duty on the part of Neslin, the vendor, to record his purchase money mortgage towards all who might become subsequent purchasers for value in good faith."

Great reliance is placed by the defendant's counsel on the decision of Judge Ray in re Hunt 139 Fed. 33 which they quote at large in their brief from page 11 to page 24 of defendant's brief.

It will be seen from an examination of this case, as well as the other cases relied upon by counsel for the defendants, that in all of them there were questions relating to the effect of a chattel mortgage recorded *before* the adjudication of bankruptcy, but within the four months period. There is not one of them like the case at bar, and like the case of Lukens cited on page 27 of my opening brief, where the question was as to the effect under Sec. 67 a. and d. of recording a deed of real estate after title by operation of law had vested in the trustees of the bankrupt. In many of the cases, as I shall presently show, where the recordation of the mortgage took place *prior* to the adjudication of bankruptcy, the Courts have held, that, if such recordation had taken place *subsequent* to such adjudication the mortgage or instrument of transfer would have been void under that Section.

Judge Ray in his opinion, so much relied upon by defendants' counsel, (defendants brief p. 15) says: "The laws of New York require the recording of such a mortgage as against purchasers and mortgagors in good faith and for value only." He then quotes the following from the statutes of New York, Sec. 241: "A conveyance of real property * * * may be recorded * * *. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration * * * which conveyance is first duly recorded." It will be observed that the law of New York is similar to Sec. 1214 of the Civil Code of California, but does not contain the additional term "void as against any judgment effecting the title," as contained in Sec. 1214 of the Civil Code. Therefore, when Judge Ray says, that a

trustee in bankruptcy is not a purchaser in good faith nor does he occupy the position of such a purchaser, he states by necessary implication that by reason of Sec 241 of the New York law, such a conveyance not recorded would be void as against a subsequent purchaser. If that is true under the law of New York, it is equally true under Sec. 1214 of the Civil Code of California which makes such unrecorded instrument void as against any judgment effecting the title. It will be seen in the case of Hunt, just cited, that Judge Ray was passing upon the rights of general creditors under the laws of New York who had acquired no interest or property right in any of the bankrupt's property either individually or through a trustee at the date of adjudication of bankruptcy. The rights of the creditors in the case at bar were fixed and determined by a judgment in rem by the adjudication of bankruptcy.

In re Frazier 117 Fed. R. at pp. 748 and 749 the Court holds, that when a bankrupt files his petition to be adjudicated a bankrupt it is a proceeding in rem; that the adjudication which vests title to the bankrupts property in the trustee is equivalent to vesting title in the creditors; that on filing the petition by the bankrupt co-instanti every creditor of the bankrupt becomes an adverse party in the legal proceedings.

This distinction between a creditor of the bankrupt whose interest in the bankrupt's property was not fixed by a judgment in rem prior to the recordation of a mortgage and the creditor whose rights and interests in the property of the bankrupt became fixed and vested by the judgment of adjudication—a judgment in rem—before the recordation

of a deed or mortgage is recognized in all the cases relied upon and cited by counsel for the defendants (defendants brief pp. 27, 28, 34.)

In one of these cases, in re Montague 143 Fed. R. 428, it will be seen, that the code of Virginia like Sec. 1214 Civil Code of California, does not *require* the recordation of the conveyance, but like Sec. 1214 Civil Code of California imposes a penalty for failure to record. Yet the Court in that case held, that the instrument, dated July 12th, 1902, and recorded Feb. 2nd, 1904, *two months before* the maker of the instrument was adjudicated bankrupt, was void as to the trustee in bankruptcy.

In the case of the Security Warehouse Co., vs. Hand 143 Fed. R. 32, the court sustains petitioners' contention, that under Sec. 67 a. and d. of the bankruptcy act a lien not perfected by recording *before* the mortgagor is adjudicated a bankrupt and title vested in his trustee for the benefit of his creditors, does not give the notice necessary to protect the mortgage from the disability imposed by Sec. 1214 Civil Code of California. The Court at pages 42 and 43 says:

"If a chattel mortgage be given in good faith and for a present consideration recording is not obligatory but the imparting of notice is. Recording is one way, another is actual and continued change of possession. If a pledge be similarly given recording is not necessary in order to impart notice because no provision has been made that a record of the fact shall be a notice of the fact. But what is necessary in order to impart notice is the delivery of exclusive and unequivocal possession. We think that Sec.

67 d. does not change 67 a. into the meaning, that claims which for want of record or for other reasons are not good liens as against creditors, are good liens as against the estate, if the lender advanced his money without any actual intent to defraud unsecured creditors. He is chargeable with the constructive intent which is attributed to secrecy."

In the case of Humphrey vs. Tatman 198 U. S. at p. 93, the Supreme Court in passing upon the validity of a chattel mortgage under the laws of Mass. where recording or possession gave it validity against general creditors, quotes with approval the decision of the Supreme Court of Mass. as follows: "It is thereunder those cases that recording or taking possession after the qualification of the trustee would be too late, and it certainly would seem not illogical to hold, that as against him the mortgage was to be treated as non-existant at any earlier date."

In re H. G. Andras Co. Fed. R. 117 p. 561 it is held: "A chattel mortgage not recorded until after the mortgagor had made an assignment for the benefit of his creditors but before he was adjudged a bankrupt; held, insufficient to create a lien under Sec. 67 a. of the bankruptcy act."

As to the effect of recording a mortgage after adjudication Judge Reed in commenting on Sec. 60 and 67 says:

"The two sections must be considered together, Sec. 60 a. relating to the payment or securing of a prior indebtedness and Sec. 67 a. to liens given for a present consideration. And if the latter are recorded at the time of the commencement of bankruptcy proceedings they are not effected thereby."

In the case of Beede 138 Fed. R. at p. 453 Judge Ray in commenting on Sec. 67 a. and d. and not considering Sec. 60 as in case of Hunt says: "All alleged liens voidable by creditors for 'want of record or for other reasons,' including filing, whenever given shall not be liens against his estate—the estate of the bankrupt. This was inserted in this act to prevent secret liens operating to defraud or even mislead creditors by reason of being secret, even if not made to hinder, delay or defraud creditors."

It will be seen from this decision, that the averments in the amended bill of complaint are covered by the intent and meaning of the act as interpreted by Judge Ray. In the case of the First National Bank vs. Connett 142 Fed. R. at p. 37, referred to so confidently by counsel for defendants, the Circuit Court in passing upon the amendment of Feb. 5th, 1903 to Sec. 60 which makes the date of recording the date of the preference, and referring to the old rule which made the State law the guide in determining the requirements of recording says: "In effect this is the adoption without exception of the old rule, that whether and to what extent a chattel mortgage given before but recorded within the four months period, is valid against the trustee in bankruptcy should be determined exclusively by the State law. In our opinion the amendment of 1903 has qualified this rule in respect to the question, whether such a mortgage may constitute a voidable preference under subs a. and b. of Sec. 60. If this has not resulted we fail to see that Congress has accomplished anything by the amendment * * * the voidable element is established by the knowledge of the Bank when its mortgages were recorded."

Constructive Fraud.

While the failure to record is in itself sufficient to render the deeds of mortgages void under Sec. 67 a. and d., yet fraud different and apart from that mentioned in sub. e. and f. of Sec. 67, is sufficient to render such deeds or mortgages void. It is that character of fraud which the Courts have denominated a fraud upon the bankruptcy act.

Counsel for the defendants in their brief have reitterated the insufficiency of the allegations of fraud by the petitioners, and cited authorities to sustain their contention. It will be observed that these authorities do not deal with the sufficiency of allegations in pleading but the sufficiency of proof, so that the insistance of counsel if correct, would require us to spread upon the record in our bill of complaint, the evidence instead of the allegations of fraud.

It has been repeatedly held by the Courts and is a settled principle of practice, that fraud cannot always be proven by the agreement or declarations of the parties, that those who are engaged in fraudulent practices, will employ the language of honesty to conceal their designs and cloak their motives. That therefore, it is proper and permissable to show the existance of a fraudulent design by acts and circumstances ftom which the intention of the parties may be drawn.

Paragraph two of the complainant's bill (trans. p. p. 13 and 14) alleges the agreement under which D. B. Fairbanks, President of the Petaluma Savings Bank, made the loan of Nine Thousand Dollars to Costigan, which is recited as follows in said paragraph: "The said real estate set forth and described in said deeds, to D. B. Fairbanks,

to be redeeded to the said A. B. Costigan on the payment of said note with the interest due and the payment of taxes and insurance."

This is one of the badges of fraud indicating the motives and the designs of the defendants. It was for the purpose of evading and violating article XIII Sec. 5 of the Constitution of California which provides: "Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage * * * shall, as to any interest specified therein and as to such tax or assessment, be null and void."

Burbridge vs. Lemmert, 99 Cal. 493.
Matthews vs. Ormerd, 22 Cal. 369.
Hamion vs. Barrett, 99 Cal. 607.
Germs vs. Jenson, 103 Cal. 374.

It must be born in mind, that the questions presented here by the case at bar are not, as counsel for the defendants erroneously insist, as to the sufficiency of proof, but as to the sufficiency of facts alleged to entitle the petitioners as trustees of the bankrupt's estate, to the relief prayed for by the District Court in the exercise of its summary jurisdiction, on any one or more of the grounds alleged in their bill.

The District Court would certainly, in the exercise of those summary powers over property in *custodia legis*, decree these deeds to be simply mortgages; and with equal certainty it must hold, that this property, the title of which had vested in the trustees by operation of law, could not be divested or impaired by a subsequent recordation of a mere mortgage lien. It would certainly also, in the exercise of

that summary power hold, that an agreement void under the constitution of California, could not be enforced against the trustees of the bankrupt.

WILLIAM A. COULTER,

July 16, 1906. Solicitor for Petitioners.

No. 1319

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of C. K. McINTOSH and JAMES P. BROWN, as Trustees in the Bankruptcy of the Estate of A. B. Costigan, Bankrupt

Brief for Defendants

In opposition to Petition by trustees of Bankrupt Estate for Review and Revision of the Decree of the United States District Court for the Northern District of California

WM. B. HASKELL,
HENRY C. McPIKE,
Solicitors for Defendants.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 1319.

In the Matter of the Petition of C. K. McINTOSH et al., as Trustees of the Estate of A. B. Costigan, Bankrupt.

BRIEF FOR RESPONDENTS, PETALUMA SAVINGS BANK AND D. B. FAIRBANKS.

The judgment of the District Court should be sustained.

The Complaint fails to allege that there are any creditors of the bankrupt, whose claims, together with the expenses of administering the estate, would not be amply paid by the assests in the hands of the trustees.

In a recent case, decided by the Circuit Court of Appeals for the Sixth Circuit, the opinion being by Circuit Judge Lurton, the court *held*: "In a suit by a trustee in bankruptcy, to recover an unlawful preference, only so much is recoverable as is necessary for the payment of claims, and the costs and expenses of administering the estate;" and in the case of Mueller vs. Bruss (112 Wis. 406, S. C. 83 N. W. 299) the Supreme Court of Wisconsin reversed the

Rogers vs 140 Fed Syl 5.

lower court in overruling a demurrer to a complaint, which failed to allege the matters above referred to. The Mueller-Bruss case was this:

The defendant, Julius Bruss, filed a voluntary petition in bankruptcy, and was thereafter duly adjudged a voluntary bankrupt. Before he filed his petition, the bankrupt, while in debt to creditors who afterwards filed their claims in the bankruptcy proceedings, conveyed certain of his real estate to his wife, without consideration. Thereafter he conveyed certain other real estate to his daughter. Both conveyances were voluntary, and made with intent to hinder, delay and defraud his creditors; the fraudulent intent being participated in by the wife and daughter, who took possession of the property, claiming to be owners thereof. There was no allegation in the complaint *that the trustee did not have sufficient assets in his hands to satisfy the claims of the creditors.* A demurrer to the complaint was filed, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer being overruled, an appeal was taken. On appeal the Supreme Court in passing on the matter used the following language:

> "A third proposition is, that the trustee cannot maintain this action unless it is shown by the complaint that he has not sufficient assets in his hands to satisfy the claims of the creditors of the debtor. No such showing is made in the complaint. For all that appears therein, there may be money and property enough in his hands to pay every claim filed against the

> debtor. The conveyances attacked were good between the parties thereto. (Ellis vs. Land Co., 108 Wisc. 313). Third parties are not allowed to impeach them unless it is necessary to do so in order that justice may be done. The trustee has no right superior to that of the creditors he represents. If we admit that the facts stated show such transfers to have been fraudulent, still no right to avoid them exists unless it appears that some one was harmed. It seems quite evident, without argument, that, unless it is made to appear that the property so conveyed is needed to pay the claims filed against the debtor, the trustee has no right to set such conveyance aside. The complaint is insufficient in this respect. It ought to show the amount of claims filed, and the value of the assets in his hands, so that the court may determine the necessity of resorting to this proceeding. Its infirmity in this respect renders it susceptible to the demurrer."

Let us pass in review the allegations of the complaint in the case now before the court, and see if any of them contain what is requisite in this behalf. Before doing so, however, we will acquaint the court with two several dates mentioned in the complaint, of some importance to be understood. The first date is, the "12th day of May, 1903." That is the day upon which it is alleged, the two certain deeds were executed by the bankrupt to the respondent, D. B. Fairbanks, conveying the lands, the subject of the preference, claimed to have been given. The other date is the "16th day of September, 1904." That is the day upon which the bankrupt filed his petition for an adjudication of bankruptcy.

The complaint:

Paragraph I, found on pages 12 and 13 of the transcript, sets forth: The borrowing of money by the bankrupt on the 12th day of May, 1903, the giving of his promissory note therefor to the cashier of the Petaluma Savings Bank, and the execution of the deeds as security therefor to D. B. Fairbanks, the cashier, conveying to him the lands in controversy. No mention of any creditors' claims.

Paragraph II, found on pages 13 and 14, alleges that the deeds to Fairbanks were in lieu of mortgages, to secure the payment of the promissory note. No mention of any creditors' claims.

Paragraph III, page 14: Alleges possession of the lands described, in the bankrupt. No reference to any creditors' claims.

Paragraph IV, page 14: Alleges the filing of the petition for an adjudication of bankruptcy, on the 16th day of September, 1904. No mention of any creditors' claims.

Paragraph V alleges that the deeds above mentioned were not recorded until after the adjudication in bankruptcy had been made. No mention of any claims of creditors.

Paragraph VI, p. 21, alleges that the defendants withheld said deeds from the records after they had reasonable cause to believe Costigan bankrupt. No mention of any claims by creditors.

Paragraph VII, page 15, alleges that the deeds are an unlawful preference.

Paragraph VIII, pages 18 and 19, alleges that the effect of the transfer of the lands mentioned will enable the defendants to obtain a greater percentage of the debt due them—than any other of the bankrupt's creditors of the same class. No mention of any creditor's claims.

Paragraphs IX and X we will take up further on.

Paragraph XI, page 23, alleges that the trustees, within 30 days after adjudication, filed a certified copy of decree of adjudication in "Fresno County, in the office of the Recorder of Deeds," the county where the land was situated. No mention of any creditors' claims.

Then follows the prayer of the complaint.

Let us now give attention to paragraphs IX (pages 22 and 23) and X (page 23) and see if either of them alleges that there are any creditors whose claims amount to more than the assets in the hands of the trustees, or, that, after payment of the same in full, there would not be enough assets to pay the expenses of administration of the bankrupt's estate.

Paragraph IX:

> "Your orators further show, that at the time said Costigan delivered said deeds to the defendants (May 12, 1903) he did not own any other real estate than that described in said deeds; that during the period named, on and between the 12th day of May, 1903, and the 16th day of September, 1904, all of the said Costigan's personal property was pledged to secure a part of his indebtedness, and that his indebted-

ness exceeded the value of the personal property so pledged in the sum of about sixty thousand dollars."

Thus far there is no mention of any creditors' claims. And, of course, under the familiar rule that a pleading, in the face of a demurrer, is to be most strongly construed against the pleader, the court will feel itself bound to assume, that *after* "the time said Costigan delivered said deeds" he acquired *other* real estate, and that when "his indebtedness exceeded the value of the personal property so pledged in the sum of about sixty thousand dollars," that it did not exceed the value of his other real estate in that amount, or in any amount, and that in reality he was not insolvent.

But to resume: The next clause of paragraph IX that we are considering is as follows:

"That the said A. B. Costigan, during the said period between May 12, 1903, and September 16th, 1904, before and after the said note to the Petaluma Savings Bank was due, represented to creditors from whom he borrowed large sums of money from time to time, that he was the owner of the real estate set forth and described in the deeds to D. B. Fairbanks hereinbefore more fully described, but failed to, and did not notify said creditors that he had conveyed said property by deed to the said D. B. Fairbanks; that by reason of said representations, and by reason of the failure of the defendants to have the said deeds recorded and their failure to disclose the existence of such deeds, the said creditors were misled and deceived and gave credit, and made large loans of money to the said A. B. Costigan; and your

orators allege that the failure to so record said deeds by the defendants gave a false credit to said Costigan, and operated as a fraud on his other creditors, who are still unpaid."

The above completes the allegations of paragraph IX. There is no allegation that there are any creditors of the bankrupt whose claims, together with the expenses of administering the estate, would not be amply paid by the assets in the hands of the trustees. This entire paragraph bears no fruit by way of useful allegation. The part which alleges that Costigan "before and after the note to the Petaluma Savings Bank was due, represented to creditors from whom he borrowed large sums of money from time to time, that he was the owner of the real estate set forth and described in the deeds to Fairbanks," fails to allege that he did not pay said creditors the money "borrowed from time to time," nor that the amount thereof, as we have elsewhere said, was not more than covered by the assets in the hands of the trustees, if such creditors still held claims against Costigan when he became bankrupt, and if they were "still unpaid," how much their claims amount to and what relation that amount bears to the assets on hand.

This brings us to paragraph X, page 23. In this paragraph the pleader sets forth in detail the property owned and possessed by the bankrupt on the day of the adjudication, but makes no attempt at showing that the claims of the creditors exceed it in value. It concludes with the following words, "that

if the said bank is permitted to take said property to satisfy its claim of nine thousand dollars, it will result in great loss and injury to the other creditors of the said Costigan."

How is the court to know from the above, that the property conveyed to defendant Fairbanks did not leave sufficient assets in the hands of the trustees to satisfy the claims of the creditors. Or, if it did not, that the surplus in value of the land beyond any claims of Fairbanks upon it, when added to the assets in hand was not ample to pay the claims of the creditors?

There is nothing in either of these paragraphs, IX or X, which states that the assets in the hands of the trustees is not more than sufficient to pay all the creditors of the bankrupt.

There is no allegation in the complaint that the claims against Costigan, bankrupt, and the expenses of administering his estate amount to more than the value of his "seat in the Merchants' Exchange" "and the ten shares of Pacific Motor Car Company;" or if these sums exceed those values, that they will not be more than paid by the thousand dollars excess value of the real estate mortgages to the bank, over and above the claims of the bank upon it?

There being no allegations anywhere in the complaint that the bank lays claim to anything more than the amount of its claim of nine thousand dollars, what is there to prevent the trustees from selling this real estate in a summary proceeding, if the sur-

plus in value is necessary for the payment of claims, paying the bank the amount of its mortgage, and devoting the surplus to the payment of the creditors' claims, if there are any, and to the expenses of administering the estate according to law?

What right have the trustees to invoke the jurisdiction of the court in a plenary suit, to set aside these transfers, without exhibiting a reason, based on the conditions and exigencies of the estate, as a warrant for so doing? Not having shown that there are any claims of creditors to be paid, what will they do with the proceeds of this "preference?" Will they give it back to Costigan?

The concluding paragraph of subdivision X of the complaint, in these words:

"that if the said defendant bank is permitted to take said property to satisfy its claim of nine thousand dollars, it will result in great loss and injury to the other creditors of the said Costigan," must have something in the complaint somewhere to give it support. There must be "loss" or "injury" to the creditors from a failure of assests, affirmatively alleged or the pleading is insufficient.

II.

The failure to record the deeds until after the adjudication, in the absence of an allegation that they were withheld from record by agreement between the parties for the fraudulent purpose of giving to the bankrupt a false credit;

or that the grantee actively concealed the fact that such deeds were made with fraudulent intent to deceive and defraud the creditors of the grantor, is not sufficient to make such deeds an unlawful preference.

It is provided by Statute in California that "An unrecorded instrument is valid between the parties thereto and those who have notice thereof." (Civil Code Sec. 1217.)

What an "instrument" is, as used in the Codes, the Supreme Court of California has stated to be as follows:

"The word 'instrument,' as used in the Codes, invariably means some written paper or instrument signed and delivered by one person to another, transferring the title to or giving a lien on property, or giving a right to debt or duty."

Hoag vs. Howard, 55 Cal. 564.

There can be no question that the deeds from Costigan to Fairbanks are "instruments" within the meaning of the above Section of the Civil Code. There is another Section of the Civil Code that bears somewhat on the matters here. It is Section 1107, the provisions of which are as follows:

"Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer who, in good faith and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded."

"The lien of an unrecorded mortgage," says the Supreme Court in the case of Bank of Ukiah vs. Petaluma Savings Bank (100 Cal. 590), "given to secure a loan, is created by the mere execution and delivery of the mortgage, and takes precedence over an attachmnt or judgment lien obtained after its execution."

So that we have, in the case before the Court, a deed constituting a mortgage, executed on the 12th day of May, 1903, to secure a loan, made on that day, but not recorded until a few days after the adjudication of bankruptcy. Is such a deed or mortgage valid under the bankruptcy Statute? We contend that it is, unless it has been shown to have been purposely withheld from the records by agreement between the parties, for the purpose of defeating the provisions of the bankruptcy law, or that other persons were thereby induced to extend credit to the grantor or mortgagor or forego their legal rights.

In a case recently decided by the District Court of the United States for the Northern District of New York (In re Hunt 139 Fed. 283), the facts were as follows:

The bankrupt gave a mortgage in June, 1903, on all his real estate, to the Delaware National Bank. A year after that, on the 10th of June, 1904, the mortgage was recorded. A week after the recording he was on his own petition adjudged a bankrupt.

The existence of the mortgage from the time of its execution to its recording, a period of a little over a

year, was known to the Mortgagor (bankrupt) and the bank and its officers only.

When the mortgage was given the president of the bank, who conducted the business about the mortgage, asked the Mortgagor Hunt "if he would not give him a mortgage to secure what he owed the bank." In reply he agreed to do so, requesting that it be not recorded, asking if it was necessary to record it, also stating that he owed no one else, and that to record the mortgage might or would "hurt his credit in New York." The president of the bank said in reply, he "would not be in a hurry about recording it." The president very soon thereafter consulted one of the directors of the bank as to this necessity for recording, and was advised by him (who seemed also to be the legal counsel of the bank) that it was not necessary, in view of the mortgagor's statement that his entire indebtedness was represented by obligations in the bank.

In fact, at the time the mortgage was given, the mortgagor owed at least $25,000 in that vicinity and elsewhere, or about $20,000 more than he owed the bank. This had been his indebtedness to various parties for several years. The personal estate of the mortgagor was worth only about $3000. During the period of the existence of the mortgage, and while it remained unrecorded, extensive credit was given and extended to the mortgagor. And on two occasions the president of the bank stated in substance, to inquirers to whom the mortgagor owed

money, that he owned his real estate clear.

The referee sold the mortgaged property and deposited the proceeds of sale to await the determination of the court as to the validity of the mortgage as a lien in preference to the claim or right of the trustee.

District Judge Ray, writing the opinion, first quoted Section 60 b of the Bankruptcy Act as follows:

> "If a bankrupt shall have given a preference, and the person receiving it or the person to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

He then *held*: "The bank and its agent, the president, intended to secure and secured this mortgage for the purpose of obtaining a preference," within the meaning of the statute. "But," says the learned judge, "to constitute a *voidable* preference within the meaning of the bankruptcy act, something more is necessary. Subdivision "a" of the same section (Section 60) says, "A person shall be deemed to have given a preference, if, being insolvent (the mortgagor was insolvent) "he has within four months before the filing of the petition . . . made a transfer of any of his property" (this he has done, for a mortgage is a transfer) "and the effect of the enforcement of such transfer" (mortgage) "will be to enable any one of his creditors to

obtain a greater percentage of his debt than any other of such creditors of the same class." (This it will do, for there were other creditors of the same class, who will receive nothing if this mortgage prevails.) Where the preference consists in a transfer" (mortgage) "such period of four months shall not expire until four months after the date of the recording or registering is required." "This last sentence," says the judge, "was added by the amendment of February 5, 1903."

This last sentence made quite a change in the bankruptcy act, with reference to the period of time over which the investigation of a bankrupt's transactions should take place. And in order that his views might be made plain he gave the following history of the amendment.

"As introduced in the House of Representatives by the author of the amendment, as it was reported from the Judiciary Committee of the House, the words 'or permitted, or if not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property transferred,' followed the word 'required,' and ended the sentence. Had the section become a law in this form, the ending of the amendment would have been, 'If, by law, such recording or registering is required or permitted.' In this regard it followed subdivision b, Section 3 of the act. The Senate struck out the words 'or permitted,' etc., above quoted. Did it regard these words as surpersage? Were they surpersage?

This court thinks not. The words 'if by law such recording on registering is required' must mean the same as they would if the words 'to make the transfer valid as against the general creditors of the person executing it' were added after the word required.' "

After showing the meaning of the last sentence of Section 60 a, he went on to say concerning the case he was deciding:

"In New York the registering or recording of a mortgage on real estate is not required in order to give it validity as against the mortgagor, or general, or even judgment creditors, consequently recording is not required to give it validity as against the trustee in bankruptcy. The word 'required' does not mean the same as 'permitted,' or the same as the words 'required in any case, or for any purpose.' "

"In some States a real estate mortgage must be recorded or registered to be good as against even general creditors. The laws of New York require the recording of such a mortgage as against purchasers and mortgagers in good faith and for value only."

He then quotes the following from the Statutes of New York. (Laws of 1896, p 607, c 547.)

> "Sec. 241. Recording of conveyances. A conveyance of real property . . . . may be recorded. . . Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration . . . . whose conveyance is first duly recorded."

A reference is then made to Collier on Bankruptcy 5th Edition, p 453, for some strictures on the failure to adopt the "Ray bill" containing the matter stricken from the amendment by the Senate above reefrred to, and some concurring remarks by Judge Ray, and concludes this branch of the opinion by saying, "The date of the beginning of the four-months' period referred to ought to be the date of the recording or filing the instrument or of taking open possession of the property. However, courts must administer the law as they find it."

"Within the meaning of the act," says the judge at page 287 of the report, "a preference (by mortgage of real estate), to be avoided by the trustee, must have been given by the (now) bankrupt under the following conditions: (1) The debtor must have been insolvent. (2) The effect of the enforcement of the preference (mortgage in this case) must be to enable any one of the creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. (3) The person receiving such preference, or his agent acting in receiving it, *must have had reasonable cause to believe that it* was intended thereby (the giving and receiving of the instrument) to give a preference; is, in making such transfer by giving the instrument, to enable the creditor receiving it to obtain a greater percentage of his debt than that received by any other of such creditors of the same class. (4) *In the State of New York* such instrument, if a mortgage of real

estate, must have been *executed and delivered within four months* immediately preceding the filing of the petition in bankruptcy. It is proper to say, that in New York the purpose of recording real estate mortgages is not, and has not been, to give notice to or protect the general creditors, or even judgment creditors of the mortgagor. As to judgment creditors, even unrecorded mortgages on real estate are valid."

Judge Ray then (p 287, near bottom) comments on the difference between the rule in New York as to judgment creditors, and that which obtains in Georgia. Saying that in the latter State the law requires a mortgage of real estate to be recorded. Evidently answering some position taken by counsel for the trustee in reliance upon a Georgia case.

Next, Judge Ray, at the top of page 288, says "a trustee in bankruptcy is not a purchaser in good faith, nor does he occupy the position of such a purchaser. He takes the property of the bankrupt in cases not affected by fraud in the same plight and condition the bankrupt held it as of the date of the adjudication, and subject to all equities impressed on it in the hands of the bankrupt, except in cases where there has been some conveyance or incumbrance void as against the trustee, made so by some positive enactment of the bankrupt law."

Citing in support, in re Garcewich 115, Fed 87-89, 53 C. C. A. 510, Thompson vs. Fairbanks 196 U. S. 526 and other authorities.

The judge then takes up a number of cases in which care was not taken to distinguish between those cases where a lien is actually created or given by an agreement in writing, and those where a lien is agreed to be given or created in the future, showing that much confusion has resulted, and then passes on pages 290 and 291 to a consideration of the facts of the case before him. And we invite the particular attention of the court to those facts found by the judge actually to exist in that case, and contrast them with the facts of this case as disclosed by the complaint.

In the first place Judge Ray says:

"There can be no doubt that there was an agreement between Hunt, the mortgagor and Honeywell, the president of the bank, at the time the mortgage was given, and as a part of the transaction, that the bank would not put the mortgage on record at that time."

In the case at bar there is not a word said in the complaint that anything was said, agreed or understood between the Petaluma Savings Bank or the Fairbanks acting for it, and the bankrupt Costigan about recording or not recording the deeds. Indeed, the complaint does not allege that at the time the deeds, constituting the mortgage, were executed, that Costigan, the bankrupt, was insolvent, or had a single creditor outside of the one created by the making of the loan, that is to say the Petaluma Bank, or that the Petaluma Bank, the Fairbanks or

any one at all suspected even that Costigan was bankrupt, and there is no possible way of telling even now, so far as the complaint is concerned whether he was insolvent or not insolvent, down to the very date almost of the filing of the petition, nearly a year and a half later.

To bring Costigan within the purview of the Statute with reference to preferences, yes, to constitute a preference at all, there is a prerequisite absolutely indispensable to exist—that is to say, a man must be *insolvent* to constitute a preference—insolvency is a *sine qua non.*

The definition of a preference is found in Section 60 a of the bankrupt act. What are its initial words? "A person shall be deemed to have given a preference if *being insolvent,* he has," etc. Search the complaint industriously, take its allegations, few indeed, and its innuendos and implications there are many, and put them all together in their strongest array and they will not bring forth the allegation that Costigan was insolvent on the twelfth day of May, 1903, the day of the transfer, or even had a creditor in the world at that time.

How different from the New York case. In that case the bank had been dealing with Hunt for years before the unrecorded mortgage was executed, and, as a fact, he was hopelessly insolvent, and, "being insolvent, made the transfer."

The judge proceeded with the facts:

"There is no doubt that there was also an under-

standing between Hunt and Honeywell at some time that the mortgage must have been executed and delivered over four months prior to bankruptcy proceedings in order to be good as against general creditors." This, of course, looks bad on its face, and approaches the domain of fraud, and there is an attempt in the case at bar to allege the existence of a state of facts which would bring this case into the same category. The language is as follows:

"Your orators allege that on this 12th day of November, 1903, when the note of the said A. B. Costigan became due and payable, ... the said defendants did not make known to the creditors," etc. (Tr p 21, par. VI.)

Judge Ray, commenting on the above state of facts in the New York case, went on in the next sentence to say, "But the evidence would tend strongly to show that this understanding was arrived at about May, 1904, not in June, 1903." It being the law of New York, that the mortgage or preference was complete the day that it was delivered—on the day upon which the transaction took place, and not on a subsequent day. So that, in the opinion of the judge, there was a period of time of considerable duration which elapsed after the relative rights between the mortgagor and mortgagee had become settled before any understanding took place with reference to the four months' period—that is the period of four months had already elapsed. So here the date of the commencement of inactivity

with reference to recording did not have its beginning until six months after the execution of the mortgage and the delivery by the bank to Costigan of nine thousand dollars.

The rest of the facts of the New York case, taken from the words of Judge Ray, and found, commencing at about the middle of the last paragraph on page 290 of the report, may be summarized as follows:

In April or May, 1904, Honeywell (president of the bank), when asked as to the financial responsibility of Hunt (the bankrupt), said in substance, they (meaning the bank) regarded him (Hunt) as solvent.

That he had in real estate, with nothing against it, more than the amount of the bank's indebtedness, and his stock of goods and accounts would more than offset his other indebtedness. Honeywell did not know even approximately the indebtedness of Hunt. Shortly before filing his petition in bankruptcy, Hunt made incorrect and untruthful statements regarding his indebtedness to some of his numerous creditors.

Honeywell, along in the spring of 1904, but more than six months after the execution and delivery of the mortgage, failed to disclose that the bank held the mortgage when inquiry was made as to the standing and financial responsibility of Hunt.

Right at this point Judge Ray pointed out in a few words a significant matter with reference to the "concealment of the fact" that the mortgage was in

existence, which applies with equal force to the allegations of the complaint in the case at bar, to which we will in a moment direct the attention of the court. Commencing after the semi-colon on the fourth line from the top of page 291, Judge Ray says: "but it is not shown that Honeywell had authority to make such concealment." The law being, of course, that a corporation must act through its duly authorized agent and can only be bound by an agent having such authority—and that in order to bind the bank the real party with whom the transaction of the execution of the mortgage took place, it must be shown that the person assuming to act for it had authority to so act. In the case at bar we have the allegation in the complaint (Tr p 12) "A. B. Costigan, now a bankrupt, borrowed from the Savings Bank of Petaluma, a corporation doing business at the town of Petaluma, in said State, the sum of nine thousand dollars." In paragraph VI, page 21, we find the allegation that H. T. Fairbanks, the president of the bank, "had knowledge" (six months after the mortgage was executed and the money lent) "that Costigan was engaged in a hazardous business—was speculating in margins—that the real estate had been conveyed to him by his father, J. M. Costigan, for the purpose of securing credit, and was on friendly and confidential terms with Costigan senior and junior, and had reasonable cause to believe that Costigan junior was insolvent. Yet there is not an allegation or a hint that the bank

knew any of these things, or that it was on account of any such knowledge that the bank, the real defendant here, withheld the deeds from record. In the absence of an allegation of the complaint connecting the bank with the matters attempted to be charged in paragraph VI, what is it all worth any way.

In concluding the opinion, Judge Ray says of the evidence in the New York case, just as we say of the allegations of the complaint here, "But it is not shown that he actively concealed the existence of the mortgage, or that Honeywell's acts and declarations whatever they were, influenced any person to give or extend credit to Hunt. In short, it is not made to appear that the nonfiling of the mortgage either induced any person to give credit to Hunt or forbear suit or bankruptcy proceedings. If the evidence established that Honeywell, president of the bank, mortgagee, kept secret and withheld the mortgage from record for the purpose of allowing the four months to run so as to defeat the povisions of the bankruptcy act relating to preferences and intended so to do when he took it, this court would hold that such acts were in fraud of the act, and rendered the mortgage void. (Blannerhassett vs. Sherman, 105 U. S. 100; Clay vs. Exchange Bank of Macon, 121 Fed 630; Curtis, Receiver vs. Lewis, 74 Conn. 367; Hildreth vs. Sands, 2 Johns Ch. 35.) But while the court may have its suspicions that such was the fact, it is not therefore at liberty to so find or hold, even if those suspicions are justified by and grow out of the

evidence. Fraud must be proved. It may be inferred from facts established by competent proof, but the inference of fraud cannot legally be drawn and is not justifiable when the inference of innocence is just as consistent with the facts. I cannot find from this evidence that the failure to record the mortgage was accompanied by such acts on the part of the mortgager or of its agents that a fictitious credit was given to Hunt, now the bankrupt, or that the acts of the defendant induced any creditor to forego any right. The defendant is not estopped from asserting the mortgage."

We have drawn largely upon the foregoing opinion, for two reasons. First, it is written, and the case decided from the point of view of the law of a State almost identical with our own; one from whose legislation and judicial decision greater and deeper draughts have been made by California, than from any other country, save England alone; and, second, the facts bear many features that may be recognized in the countenance of our case, and the reasoning of the learned judge more strikingly sets forth and the exposition of the legislative changes wrought in the bankruptcy act by the Amendment of February 5, 1903, are better illustrated than they have been in any reported case since the amendment, that we have been able to find.

In his opinion sustaining the demurrer, Judge De Haven concludes with the words, "It is not sufficient to simply allege probative facts from which it may

be argued that there was such agreement or active concealment," referring to the rule stated in an earlier part of the opinion, in harmony with the dictum of Judge Ray, above quoted. An inspection of the allegations of the complaint found in paragraph VI on page 21, and paragraphs IX and X on pages 22 and 23 will show how well founded the concluding remarks of Judge De Haven are.

Take, for instance, paragraph VI and follow it to the last period (punctuation mark) on page 21: in its entire twenty-one lines, the only statement of a fact is "that the said several deeds were not filed for recording with the recorder of the County of Fresno, State of California, by the said defendants." All that precedes this statement is mere conjecture. It does not even allege directly that the promissory note fell due on the "12th day of November, 1903." Instead, it says, "Your orators allege that on the 12th day of November, 1903, *when* the said note of the said A. B. Costigan became due and payable, and the said A. B. Costigan defaulted and failed to pay the same, the said H. T. Fairbanks, president of the said defendant bank, *who* had knowledge that the said A. B. Costigan was engaged in a hazardous business . . . . . *yet* the said defendants," etc., etc. None of these clauses rises above the dignity of probative facts, from which an inference may be drawn, or an argument based that the defendants by some indirection or other, did something that they ought not to have done, or omitted

something that they ought to have done. It is not right to place a defendant, a respectable institution, on trial upon arguments, innuendos and inferences, when it is so easy to state facts as facts, if they have any foundation in truth.

If the transfer by Costigan to the bank in May, 1903, is to form the basis of a charge of voidable preference the very first thing that the law requires to make it such is that Costigan was *insolvent* when it was made. The language of Section 60 a is, "A person shall be deemed to have given a preference if *being insolvent,* he has," etc. Now, instead of saying that "the said Costigan, at the time he made and delivered said deeds was insolvent," the pleader chose the inferential method by the followng statements of probatve facts: "Your orators further show, that at the time said Costigan made and delivered said deeds to the defendants, he did not own any other real estate than that described in said deeds." Then follows the statement that "between the 12th day of May, 1903 and the 16th day of September, 1904 (the dates respectively of the transfer and the filing of the petition) all of the said Costigan's personal property was pledged to secure a part of his indebtedness, and that his indebtedness exceeded the value of the personal property so pledged in the sum of about sixty thousand dollars." These statements were evidently made for the purpose of basing an argument upon them that Costigan was insolvent on the 12th day of May, 1903. But see how

wide of the mark even that inference or argument must be. For instance, it might be true that he owned no other real estate on the 12th day of May, 1903, yet at the time "all of the said Costigan's personal property was pledged to secure a part of his indebtedness," he might have had other real estate to cover much more than the excess over sixty thousand dollars for which the personal property was pledged, because the date of the ownership of the real estate was placed on a single day (May 12th, 1903), while the pledging of the personal property to secure a part of the indebtedness is given the wide range extending some time "between the said 12th day of May, 1903, and the 16th day of September, 1904.

There are two cases from the State of Ohio, "In re Chadwick 140 Fed. 674 and National Valve Company 140 Fed. 679, in harmony with the case from New York. (In re Hunt supra.) The former was decided in the United States District Court for the Eastern District of Ohio and the latter the Northern Disrict. The Chadwick case arose under the amendment of February 5, 1903, to Section 60 a, and the question presented and decided was similar to that of In re Hunt, and decided the same way, except that the question of active concealment and agreemnt not to record were eliminated. The reasoning of Judge Tyler on page 677 is particularly applicable to this case.

Another case, of somewhat higher authority,

notably from the Circuit Court of Appeals, for the Eighth Circuit, decided on the 17th of November of last year, but not finding its way into the reports until the month of May of this year, is First Nat. Bank, etc. vs. Connett, 142 Fed. 33. In that case the Court by Hook, Circuit Judge, adds another voice to the proposition announced in the foregoing cases. The decision there was written from the point of view of the laws of the State of Missouri. The question arose on the voidability of a preference based on a chattel mortgage, executed before the four months' period, but not recorded until after that period, the Court held that, inasmuch as a chattel mortgage under the Missouri law comes into existence as a mortgage as to general creditors when it is recorded, it likewise comes into existence at the same time, as to the trustee. And in this sense the laws of Missouri "required" that it be recorded. A mortgage of realty in California, as to the general creditors, comes into existence on delivery, not on recording.

The case of In re Montague 143 Fed. 428, arose in the District Court of the United States for the Eastern District of Virginia, involved a question similar to the above case from Missouri, to wit, the meaning of the words "if by law such recording or registering is required," found in Section 60 a (concluding words), and was similarly decided.

We believe that the foregoing cases are ample to show that in a State where, by its own laws, a mort-

gage or other transfer of real or personal property first comes into existence as to general creditors, when it is made, or executed between the parties to it, that its recording is not required within the meaning of Section 60 a of the bankruptcy act. And that whether its being recorded is or is not "required," is a matter of the law of the State where the transfer takes place.

On examination it will be found that the cases cited by Counsel for the petitioner on this appeal, cases like Chesapeake Shoe Co. vs. Seldner 122 Fed. 593 (petitioners brief p 29), (a Virginia case); Neslin vs. Wells 104 U. S. 428, petitioner's brief p 12 (a Utah case), and all save In re Lewkins 138 Fed. 188, Pet brief, p 27 (a Pennsylvania case), are cases in which something more than delivery is essential to constitute a valid lien as between a person giving a preference and the creditor. For instance, the Virginia case is one in which the Court held the recording *"required"* under the State law. It was a case of a verbal contract of sale, the laws of Virginia "required" a written memorandum of such contract to be *docketed.* In the Utah case the Statutes of that State (Territorial Laws, June 18, 1855, Laws of Utah, 1851-1870, page 93), made the validity of a transfer to depend on *recording;* hence, recording was "required."

To this list also belongs the case of English vs. Ross 140 Fed. 630, cited by Counsel at page 13 of brief, a case from Pennsylvania. In the English

Ross case the U. S. District Court for the Middle District of Pennsylvania held that a deed given for security, executed before the four months' period, without possession taken at the time of the giving of the deed, is to be judged on the question of preference by the date when it is put on record. There was something more than delivery required by the laws of Pennsylvania to complete the transaction as between the grantee and general creditors.

The case of In re Lukens 138 Fed. 188 is confidently relied on by Counsel for petitioners. It is a case which at first blush seems to be at variance with all of the cases decided by the District Courts and Circuit Courts of Appeals throughout the United States, since the adoption of the amendment of February 5, 1903. But a careful reading will show that Judge McPherson, in his opinion, had his attention directed entirely to Section 67 a of the bankruptcy act instead of Section 60 a and 60 b, which we have under consideration. A reading will show that the learned judge never once referred to Section 60 a or b, which deal with the question of preferences. The judge treated the case from the point of view entirely of liens by record. At page 191 he says, "It" (Section 67 a) "forbids the holder of an instrument, who might have had a lien if he had recorded it before the bankruptcy, to acquire such a lien by recording it afterwards." The trouble with this is, that it would not apply in California, for under the California law, as we have already pointed

out, "the holder of the instrument, acquired his lien, as soon as he obtained the instrument, and without record it was "a valid lien as against the claims of creditors of the bankrupt"—yes, even against judgment creditors of the bankrupt—which is further than many of the States have permitted the relations of debtor and creditor to go.

Judge McPherson was very much incensed apparently at the reasons given by his referee in bankruptcy, for holding that a mortgage in Pennsylvania conveyed an estate in the land and left nothing but an "equity of redemption" in the mortgagor, and in his endeavors to set the case right on that question he devoted no time at all to the consideration of Section 60 a.

At the bottom of page 191, the learned judge says, "I do not see why a delinquent mortgage creditor who has slept upon his rights should be regarded with favor and should have the benefit of any subtleby of construction." When Judge McPherson wrote that he was evidently not quite over his indignation at the decision of his referee. At any rate he was not thinking of mortgagees in California. Here, a mortgagee who puts his mortgage in his desk instead of placing it on record, is not regarded as a "delinquent who has slept on his rights." We have more regard for institutions that lend money in California than they seem to have in Pennsylvania. And who is hurt by it? Every man in California that knows anything knows that it is possible for a

man to transfer or incumber his property by an unrecorded instrument and that such unrecorded instrument is valid against every one but a *bona fide* purchaser for value whose conveyance is first duly recorded, and judgment creditors in judgments affecting the title. He gives credit to no man merely because he has real estate standing of record in his name, for he knows that it may all be conveyed away and the record disclose nothing. At page 12 of his very admirable brief, second paragraph from the top, counsel says:

"As I shall presently demonstrate, such recording is *required by law*. It can not alter or affect the provisions of the Section" (60 a) "whether its recordation is limited to certain objects and for certain purposes by State law. If its recordation is required *for any purpose,* it must be said that 'it is required by law 'and for the purposes of a *preference* or its legality under Section 67 a and d, these sections make no exceptions." Counsel begins his demonstration on page 16, quotes becomingly from Chief Justice Marshall on page 18, and ends on this subject, we cannot tell exactly where, but gather from what he has to say on page 16 and the two or three following pages that he has failed to grasp the meaning of the phrase *"if record thereof was necessary to impart notice,"* found in Section 67 d. Counsel proceeds on the theory that the words "record thereof" were not exclusive of every other kind of notice, as used in the phrase. A little re-

flection will disclose the fallacy of such a position. The words "if record thereof was necessary to impart notice" may be illustrated by the following: In some States record of a transfer is absolutely necessary to impart notice—and the law will not be satisfied with any other kind of notice. In such a case the words "if record thereof was necessary to impart notice" come into play. Take, for instance, the case of a chattel mortgage executed in Missouri the law of that State provides that "no mortgage of personal property shall be valid against any other person than the parties thereto, unless *possession* of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be *recorded* in the county in which the mortgagor resides." Here it could not be said that "recording is required to impart notice," because, notice may be given by taking possession of the mortgaged chattels, and the words "recording is required" is not exclusive. But take the case of a Chattel Mortgage executed under the laws of California.

Section 2957 of the Civil Code provides:

"A mortgage of personal property is void as against creditors of the mortgagor . . . . unless . . . . 2. It is acknowledged or proved, certified *and* recorded, in like manner as grants of real property." In such a case there is no alternative. No *change of possession*, no *actual notice*, no *anything*, but only *"recording."* Without it, the chattel mortgage is void as to general creditors and

so of course as against the trustee, for he represents the general creditors. Now that is a case which comes directly within the words *"record thereof necessary to impart notice."* No other kind of noice will impart anything but only "record thereof." Now there are many States of the Union whose statutes as to Chattel Mortgages are similar to those of California, and the lawyer who drew the provision—the phrase above quoted, from Section 67 d—knew just what he was about. He knew better than the learned Counsel for petitioners has expressed himself in his industrious brief, that to leave this clause out of the bankruptcy statute, would allow a Chattel Mortgage in some States to escape under the bankrupt act, where the State Statute held him. This clause estopped the Chattel Mortgagee from saying to the creditors, "You had actual notice of my mortgage more than four months before the petition in bankruptcy was filed."

Now, however, in a case like the California Statute presents, all the actual notice in Christendom will not avail. Actual notice does not under that law impart notice of a Chattel Mortgage. No kind of notice imparts it, but a Chattel Mortgage that is recorded. Hence, "recording is necessary to impart notice."

For some hints on this subject I would respectfully refer the court to the remarks of Circuit Judge Baker, sitting in the Circuit Court of Appeals for the 7th Circuit, in the case of Security

Waerhousing Co. vs. Hand (143 Fed. 32) at pages 42 and 43 of the report.

In conclusion, let us say that we do not, and have not anywhere in this case brought in question the jurisdiction of the court to exercise either plenary or summary jurisdiction. Therefore, the first seven or eight pages of Counsel for petitioners brief are wasted.

Opposite Counsels object of course is apparent. He feels that it is necessary to show error at any cost, and if he cannot show it as to a plenary suit, he will do it as to a summary proceeding. But a suit of this character is not a summary proceeding. We are here by invitation of the trustees asserting our lien over specific property, according to their own allegations, and so long as the petitioners show themselves unwilling to treat our mortgage as a valid one, there is no room for the exercise of the summary jurisdiction of the court.

A suit brought merely for the purpose of having our deeds declared to be mortgages with nothing more asked, would not be entertained for a moment. It would not state facts sufficient to constitute a cause of action. Strip this case of all that Counsel has prayed for on the ground of a voidable preference, and what is there left? With those allegations it does not state a cause of action. Nothing from nothing leaves something is the inevitable result of Counsels' logic. We have made no attempt at following Counsel through the mazes and labyrinths of

decision he has so laboriously gone over, nor do we deem it important to do so. The suggestion that the recording of our mortgage, subsequent to the adjudication in bankruptcy, gave the trustees some rights in the title to the property superior to our own, is without merit. We have elsewhere shown that a prior unrecorded mortgage takes precedence over a judgment. And it would indeed be a singular state of facts if it were the law that a lien that could not be acquired by a creditor before adjudication could be acquired afterwards.

We respectfully submit the foregoing as furnishing ample cause for the sustaining of the decision of Judge De Haven.

July 7, 1906.

WM. B. HASKELL,
HENRY C. McPIKE,
Solicitors for Defendants.

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No. 1320

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

AMERICAN BONDING COMPANY OF BALTIMORE (a Corporation),
Plaintiff in Error,

vs.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

THE FILMER BROS. CO. PRINT, S. F., CAL.

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THE FILMER BROS. CO. PRINT, S. F., CAL.

INDEX.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland,

Defendant in Error,

vs.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff in Error.

Statement of Errors, and Designation of Record to be Printed

To the Clerk of said Court, and to the Defendant in Error herein, and to W. E. Borah, Esq., Attorney for Defendant in Error:

You will please take notice that the plaintiff in error herein has filed its record in this court herein, and, pursuant to Subdivision 7 of Rule 23 of this Court, files with said clerk a statement of errors upon which it intends to rely, and states said errors as follows, to wit:

(1) The Court erred as to said plaintiff in error, in overruling the demurrer of said plaintiff in error to defendant in error's complaint herein.

(2) The Court erred as to said plaintiff in error, in ordering judgment to be entered in favor of the defend-

ant in error and against the said plaintiff in error, for the sum of ten thousand two hundred and ninety and 36-100 dollars and the costs of this action, and in ordering judgment in any amount whatever, against said plaintiff in error.

(3) The Court erred as to said plaintiff in error, in entering judgment in favor of defendant in error herein, against said plaintiff in error.

(4) The Court erred as to said plaintiff in error, in overruling the objection by said plaintiff in error to the admission of any evidence herein, upon the ground that the complaint herein does not state facts sufficient to constitute a cause of action against this plaintiff in error.

(5) The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the judgment-roll offered in evidence during the examination of the witness Tucker, the full substance whereof is as follows:

Said judgment roll consists of the proceedings in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, in an action wherein Ralph Cowden was plaintiff and William Finney, as Sheriff of Blaine County, Idaho, was defendant, and consists;

(1) Of complaint praying for the possession of certain sheep alleged to have been converted by said defendant as such sheriff, or for the value thereof, and for damages and costs.

(2) Of demurrer to such complaint.

(3) Of answer to such complaint, wherein defendant justified the taking of said property and the sale thereof under and by virtue of certain proceedings for the foreclosure of a chattel mortgage embracing said property, given by one R. L. Shaw to secure the payment to the Flato Commission Company of the sum therein mentioned, together with interest and costs.

That said proceedings were commenced under the provisions of secs. 3391 to 3398, inclusive, of title 12, chap. 4 of the Revised Statutes of Idaho, and are based on an affidavit and notice given by George W. Hawkes, as the agent of said Flato Commission Company.

That said property was in said proceedings sold to said George W. Hawkes, for $5,967.83.

(4) Of findings of fact and conclusions of law in said action.

(5) Of judgment by said Court in favor of plaintiff and against defendant for the possession of the property therein referred to, or in case return could not be had, then for judgment for the sum of $8,281.35, together with $516.89 interest and $750.00 costs.

(6) The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the entry from the judgment docket during the examination of the witness Tucker, the full substance whereof is as follows:

"Judgment Debtor, William Finney, Sheriff Blaine County, Idaho; judgment creditor, Ralph Cowden, amount of judgment, $8,798.24; costs, $250.00; time of

entry, June 20, 1903; page of Judgment-Book, book 2, page 121.

(7) The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the question, "It still stands as a live judgment upon the records of your office," asked of the witness Tucker.

(8) The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the papers marked Plaintiff's Exhibit "E," offered in evidence during the examination of the witness William Finney, whereof the full substance is as set forth in Exhibit "A" attached to the complaint herein.

(9) The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the remittitur from the Supreme Court during the examination of the witness William Finney, which in full substance was a remittitur from the Supreme Court of the State of Idaho, announcing the affirmance of the judgment and order denying a new trial in the case of Cowden vs. Finney, already referred to.

(10) The Court erred as to said plaintiff in error, in overruling said plaintiff in error's demurrer to the evidence.

(11) The Court erred as to said plaintiff in error, in sustaining said defendant in error's objection to the admission in evidence of the deposition of John R. Bonson, the full substance whereof was to the effect, first, that at the time of the alleged sale to Ralph Cowden, plain-

tiff in the action hereinbefore referred to, he had full knowledge and notice of the existence of the prior mortgage by R. L. Shaw to the Flato Commission Company, of the sheep alleged to have been converted by said Finney as such sheriff, second, that the value of the sheep so alleged to have been converted was an amount smaller than that found by the District Court of the Fourth Judicial District of the State of Idaho, in the action entitled Ralph Cowden, Plaintiff vs. William Finney, Sheriff, etc., defendant, in Assignment No. 5 hereinbefore referred to.

(12) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admission in evidence of the deposition of O. W. Eaton, the full substance whereof was to the effect, first, that at the time of the alleged sale to Ralph Cowden, plaintiff in the action hereinbefore referred to, he had full knowledge and notice of the existence of the prior mortgage by R. L. Shaw to the Flato Commission Company of the sheep alleged to have been converted by said Finney as such sheriff, second, that the value of the sheep so alleged to have been converted was an amount smaller than that found by the District Court of the Fourth Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. William Finney, sheriff, etc., defendant in Assignment No. 5, hereinbefore referred to.

(13) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admission in evidence of the deposition of James C. Dahlman

as to the values of sheep therein referred to, the full substance of which said evidence so rejected was to the effect that the value of the sheep alleged to have been converted was an amount smaller than that found by the District Court of the Fourth Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. William Finney, Sheriff, etc. defendant, in Assignment No. 5 hereinbefore referred to.

(14) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admission in evidence of the deposition of George W. Hawkes, the full substance of which was to the effect that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Finney as sheriff, and that said bond was without consideration, and void.

(15) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to said plaintiff in error's offer to prove by the testimony of J. C. Dressler that said Ralph Cowden was not the owner of the sheep in controversy, and that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed; and that whatever interest Ralph Cowden had or acquired in the sheep in controversy, was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw; that the judgment in the case of Cowden vs. Finney was excessive, and does not measure the true value of the sheep for the taking of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not

in excess of $6,500.00, and that that amount is the total amount of damage of all sorts caused in the premises, if any.

(16) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to plaintiff in error's offer to prove by the testimony of Ed Paine, first, that said Ralph Cowden was not the owner of the sheep in controversy, second that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed, third, that whatever interest Ralph Cowden had or acquired in the sheep in controversy, was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw, fourth, that the judgment in the case of Cowden vs. Finney was excessive, and does not measure the true value of the sheep for the taking of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not in excess of $6,500.00, and that that amount is the total amount of damage of all sorts caused in the premises, if any.

(17) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the offer of said plaintiff in error to prove by the deposition of Ed. H. Reid, that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Finney, as sheriff, and that said bond was without consideration, and void.

(18) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admis-

as to the values of sheep therein referred to, the full substance of which said evidence so rejected was to the effect that the value of the sheep alleged to have been converted was an amount smaller than that found by the District Court of the Fourth Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. William Finney, Sheriff, etc. defendant, in Assignment No. 5 hereinbefore referred to.

(14) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admission in evidence of the deposition of George W. Hawkes, the full substance of which was to the effect that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Finney as sheriff, and that said bond was without consideration, and void.

(15) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to said plaintiff in error's offer to prove by the testimony of J. C. Dressler that said Ralph Cowden was not the owner of the sheep in controversy, and that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed; and that whatever interest Ralph Cowden had or acquired in the sheep in controversy, was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw; that the judgment in the case of Cowden vs. Finney was excessive, and does not measure the true value of the sheep for the taking of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not

in excess of $6,500.00, and that that amount is the total amount of damage of all sorts caused in the premises, if any.

(16) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to plaintiff in error's offer to prove by the testimony of Ed Paine, first, that said Ralph Cowden was not the owner of the sheep in controversy, second that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed, third, that whatever interest Ralph Cowden had or acquired in the sheep in controversy, was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw, fourth, that the judgment in the case of Cowden vs. Finney was excessive, and does not measure the true value of the sheep for the taking of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not in excess of $6,500.00, and that that amount is the total amount of damage of all sorts caused in the premises, if any.

(17) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the offer of said plaintiff in error to prove by the deposition of Ed. H. Reid, that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Finney, as sheriff, and that said bond was without consideration, and void.

(18) The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admis-

sion in evidence of the deposition of George W. Hawkes, the full substance of which was to the effect that the bond in suit was not given voluntarily, but under duress and coercion by defendant in error Finney as sheriff, and that said bond was without consideration, and void.

And said plaintiff in error, pursuant to said subdivision of said Rule, states that the following are the parts of said record which it thinks necessary for the consideration thereof:

I.

The complaint, page 1 to 7 thereof, inclusive.

II.

Demurrer to said complaint, page 17 thereof.

III.

Order overruling demurrer, page 25 thereof.

IV.

Answer of this defendant, page 26 to 30, thereof, inclusive.

V.

Petitions for removal, page 43 to 48, thereof, inclusive.

VI.

Bond on removal, pages 49 and 50 thereof.

VII.

Supplemental petition for removal, page 61 to 63 thereof, inclusive.

VIII.

Order denying motion to remand, page 64 thereof.

IX.

Demurrer of this defendant, page 65 thereof.

X.

Order overruling demurrers, on page 68 thereof.

XI.

Deposition of Ed. H. Reid, page 79 to 83 thereof, inclusive.

XII.

Depositions of O. W. Eaton and John R. Bonson, page 89 to 118, thereof, inclusive.

XIII.

Deposition of Geo. W. Hawkes, page 85 to 88 thereof, inclusive.

XIV.

Transcript of testimony and exhibits, page 121 to 163 thereof, inclusive.

XV.

Findings and decision, page 173 to 175 thereof, inclusive.

XVI.

Judgment, pages 176 and 177 thereof, inclusive.

XVII.

Proceedings on severance, pages 181 to 183 thereof, inclusive.

XVIII.

Petition for writ of error, pages 189 and 190 thereof.

XIX.

Assignment of errors, page 191 to 196 thereof, inclusive.

XX.

Order for filing bond, pages 197 and 198 thereof.

XXI.

Order allowing writ of error, pages 199 and 200 thereof.

XXII.

Bond on writ of error, pages 201 and 202 thereof.

XXIII.

Writ of error, page 203 thereof.

XXIV.

Citation, page 204 thereof.

XXV.

Clerk's certificate to transcript, page 205 thereof.

NEAL & KINYON,
MORRISON PENCE,
JESSE W. LILIENTHAL,
Attorneys for Plaintiff in Error.

Dated March 31, 1906.

[Endorsed]: 1320. In the United States Circuit Court of Appeals, for the Ninth Circuit, American Bonding Company of Baltimore, a corporation organized and existing under and by virtue of the laws of the State of Maryland, Plaintiff in Error, vs. William Finney, late

Sheriff of Blaine County, Idaho, Defendant in Error. Statement of Errors, and designation of Record to be Printed. Filed March 31, 1906. F. D. Monckton, Clerk.

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In the United States Circuit Court of Appeals, for the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE (a Corporation),
Plaintiff in Error,
vs.
WILLIAM FINNEY, Late Sheriff of Blaine County,
Defendant in Error.

Designation of Additional Record to be Printed.

To the Clerk of the Above-named Court and to the Plaintiff in Error and Its Attorneys of Record, Neal & Kinyon, Morrison & Pence, Jesse W. Lilienthal:

You will please take notice that the defendant in error, pursuant to subdivision 7 of rule 23 of the above court files with said clerk a statement of additional record to be printed, to wit: All and the entire portion of the record not specified by the plaintiff in error, so as to make the record complete when printed, as transmitted by the clerk of the lower court, calling especial

attention to the affidavits in support of the petitions on removal and the judgment-roll in the State court.

W. E. BORAH,
Attorney for Defendant in Error.

Service admitted by copy this —— day of April, 1906.

————————,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1320. In the United States Circuit Court of Appeals, for the Ninth Circuit. American Bonding Company of Baltimore, a Corporation, Plaintiff in Error, vs. William Finney, Late Sheriff of Blaine County, Idaho, Defendant in Error. Designation of Additional Record to be Printed. Filed Apr. 7, 1906. F. D. Monckton, Clerk.

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In the United States Circuit Court of Appeals, for the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE (a Corporation),
Plaintiff in Error,
vs.
WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Defendant in Error.

Order Extending Time to Docket Cause.

For good cause shown, it is hereby ordered that the time to file the transcript and docket the above-entitled cause in this court be, and the same is hereby, enlarged

and extended from the 30th day of December, 1905, to and including the first day of March, 1906.

Dated December 28th, 1905.

JAS. H. BEATTY,
Judge.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth Circuit. American Bonding Company of Baltimore, Plaintiff in Error, vs. William Finney, Late Sheriff, etc., Defendant in Error. Order Enlarging Time to Docket Cause. Filed Feb. 28, 1906. F. D. Monckton, Clerk.

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In the United States Circuit Court of Appeals, for the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE (a Corporation),
Plaintiff in Error,
vs.
WILLIAM FINNEY,
Defendant in Error.

Order Extending Time to Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error herein, the American Bonding Company of Baltimore, may have to and including April 1,

1906, wherein to file the record herein, and docket this case with the clerk of this court.

WM. B. GILBERT,
Judge of said Court.

Dated February 28, 1906.

[Endorsed]: In the United States Circuit Court of Appeals, for the Ninth Circuit. American Bonding Company of Baltimore, a Corporation, Plaintiff in Error, vs. William Finney, Defendant in Error. Order Extending Time. Filed Feb. 28, 1906. F. D. Monckton, Clerk.

[Endorsed]: No. 1320. United States Circuit Court of Appeals for the Ninth Circiut. American Bonding Company of Baltimore, etc., vs. William Finney, Late Sheriff of Blaine County, Idaho. Two Orders Extending Time to Docket Cause. Refiled March 31, 1906. F. D. Monckton, Clerk.

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation, Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Complaint.

Comes now the plaintiff, and for cause of action against the plaintiff alleges:

1. That the defendant, the American Bonding Company of Baltimore now is, and during all the times hereinafter mentioned has been, a corporation organized and existing and doing business under and by virtue of the laws of the State of Maryland, and doing business also in the State of Idaho; that the defendant, the Flato Commission Company, is a corporation organized and existing under and by virtue of the laws of the State of Nebraska.

2. That the plaintiff during all the times mentioned in the complaint and while performing the acts and services in said complaint referred to was the duly elected and qualified sheriff of Blaine County, Idaho.

3. That on or about the 24th day of July, 1902, the above-named plaintiff, as sheriff of Blaine County, at the instance and request of the above-named defendant, the Flato Commission Company, and upon affidavit and notice duly filed as required by the statutes of the State of Idaho relative to the foreclosure of a chattel mortgage, took possession of certain personal property, to wit: 5,469 head of sheep, wethers, said sheep being branded with paint on wool as follows, quarter circle G, the same being what is known as the Cowden sheep, and being the same sheep hereinafter described and referred to in a certain bond, a copy of which is hereafter attached; that after the said plaintiff had taken possession of said sheep at the instance and request of the Flato Commission Company the said sheep and all of them were claimed by Ralph Cowden as his separate and individual property.

4. That in order that the said plaintiff might hold said sheep, retain possession of the same, and make sale thereof to satisfy the mortgage of the Flato Commission company under which the same had been taken and upon demand and at the request of this plaintiff, the said Flato Commission Company and the said American Bonding Company of Baltimore made and executed and delivered to the plaintiff their certain bond of indemnity in writing conditioned that the said Flato Commis-

sion Company and the said American Bonding Company of Baltimore would indemnify and save harmless the said William Finney, sheriff, from all damages, expenses, costs and charges and against all loss or liability which the said sheriff, his heirs, executors or administrators should sustain for or by reason of the taking into his possession and retention and sale of said property, said property being the same property above described, and which was afterwards involved in the suit in this complaint referred to. A copy of said bond showing more particularly the terms and conditions of said bond is hereto annexed, made a part of this complaint and referred to as Exhibit "A." That the said bond is signed and executed in the name of the American Bonding and Trust Company of Baltimore City, Maryland. That said American Bonding and Trust Company of Baltimore City, Maryland, is the same corporation and person as the above-named defendant, the American Bonding Company of Baltimore, said company having changed its name by authority of the legislature of Maryland from the American Bonding and Trust Company of Baltimore City, Maryland, to the American Bonding Company of Baltimore, said company sometimes executing its instruments in one name and sometimes in the other.

5. That upon the execution and delivery of said bond of indemnity, and in consideration of giving the same, the said plaintiff retained possession of said sheep and sold the same at the instance and request and under the authority and advice of the said Flato Commis-

sion Company and the American Bonding Company of Baltimore.

6. That thereafter the said Ralph Cowden commenced an action against this plaintiff as sheriff of Blaine County in the District Court of the Third Judicial District of the State of Idaho, in and for Blaine County; that thereafter the said suit was transferred for trial to Canyon County in the above-named court and district. That said plaintiff herein appeared as defendant in said suit, and contested the same, and did so at the instance and request and with the full knowledge, notice and consent and by the advice of the said Flato Commission Company and the American Bonding Company of Baltimore above named. That thereafter the cause came duly on for trial, and that such proceedings were had that upon the 17th day of June, 1903, the Court made its findings of fact and conclusions of law, deciding and holding thereby that the plaintiff was entitled to the personal property heretofore described and to the return thereof or the value thereof, amounting, principal and interest, to the sum of $8,798.24 and for costs, and that upon such findings of fact and conclusions of law judgment of said Court was duly and regularly entered, wherein and whereby it was ordered, adjudged and decreed that the said Ralph Cowden have judgment against the defendant therein, plaintiff herein, William Finney, sheriff, for the return of said property or for the value thereof in the sum of $8,798.24 and for costs of suit amounting to $250. That said judgment bears date June 17, 1903; that thereafter an appeal was duly taken

by this plaintiff to the Supreme Court of the State of Idaho, and thereupon such proceedings were had that upon the 4th day of February, 1904, the said judgment herein referred to was by the Supreme Court of the State of Idaho duly and regularly affirmed, and that said judgment remains unsatisfied and unpaid and is a liability against this defendant. That by reason of said judgment aforesaid and the affirmation of the same by the Supreme Court of the State of Idaho, this plaintiff is liable to the said Ralph Cowden in the sum of $8,798.24 principal and interest, together with costs amounting to $250, with interest on said amount at the rate of seven per cent per annum from June 7, 1903. That plaintiff herein has demanded payment of the same of the said defendants, and that they have neglected and refused to pay for the same.

7. That the conditions of said indemnity bond, a copy of which is set forth as Exhibit "A," have been broken, and the defendants are liable to this plaintiff for the same in the amount aforesaid under and by virtue of the terms and conditions of said bond in the sum of $8,798.24 principal and interest, and the further sum of $250 costs, with interest on each of said amounts at the rate of seven per cent per annum from June 7, 1903.

Second Cause of Action.

For a further and second cause of action against the defendants the plaintiff alleges:

1. The plaintiff refers to paragraphs 1, 2, 3, 4, 5, 6, and 7 of the first cause of action and adopts them as

allegations in the second cause of action the same as if they were fully set forth.

2. That this plaintiff, in contesting said action herein referred to, has paid out, contracted for and become liable for charges, expenses and costs in traveling and attorney fees the following sums: For traveling expenses, $42.90; for attorneys' fees contracted and agreed to be paid in the matter of bringing suit herein, $500. That said amounts are due and unpaid, and that the defendants neglect and refuse to pay the same, although requested so to do. That the conditions of said indemnity bond, a copy of which is set forth here as Exhibit "A," has been broken, and that the defendants are liable to this plaintiff for the sum and amount of $542.90 for costs, charges and expenses covered by the terms and conditions of said bond.

Wherefore plaintiff prays judgment against the above-named defendants and each of them for the sum of $9,048, with interest thereon at the rate of seven per cent per annum from June 17, 1903, and for the further sum of $542.90 for costs of this suit and for all proper relief.

W. E. BORAH,
Attorney for Plaintiff.

State of Idaho,
County of Ada,—ss.

W. E. Borah, being duly sworn, deposes and says: That he is one of the attorneys in the above-entitled action, that he has read the above and foregoing complaint, knows the contents thereof, and that the facts

stated therein are true of his own knowledge except as to matters therein stated to be on information and belief, and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that the plaintiff herein is absent from the county where the attorney resides and where the suit is filed.

W. E. BORAH,

Subscribed and sworn to before me this 13th day of May, 1904.

[Seal] JOHN J. BLAKE,
Notary Public.

Exhibit "A."

INDEMNITY BOND OF FORECLOSURE OF CHATTEL MORTGAGE.

Know all men by these presents, that we, the Flato Commission Co. of Omaha, Nebraska, as principal, and the American Bonding and Trust Company, of Baltimore, Md., as surety, are each held and firmly bound unto William Finney, sheriff of Blaine County, State of Idaho, in the sum of ($10,000) Ten Thousand Dollars, lawful money of the United States, to be paid to William Finney, sheriff or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22d day of July, 1902.

Whereas, under and by virtue of an affidavit on the foreclosure of a chattel mortgage given by one R. L. Shaw to the above-named Flato Commission Company, and the notice required by the statutes of Idaho for the foreclosure of chattel mortgages, directed and delivered to the said William Finney, sheriff of Blaine County, the said sheriff was directed to take into his possession the said mortgaged property, and to sell the same, and the said sheriff did thereupon take into his possession the following described property, to wit: About twenty-six hundred wethers, more or less, branded with
and other marks.

And whereas, upon the taking of said sheep, other persons or person claimed the said property as their own and

Whereas, the said Flato Commission Company, notwithstanding said claim, requires the said William Finney, sheriff, that he shall retain said property in his possession and sell the same,

Now, therefore, the condition of this obligation is such that if the said Flato Commission Company of Omaha, and the American Bonding and Trust Company of Baltimore City, Md., sureties, their heirs, executors, administrators or successors, or either of them, shall well and truly indemnify and save harmless the said William Finney, sheriff, his heirs, executors and administrators, of and from all damage, expense, cost and charges, and against all loss and liability which he, the said sheriff, his heirs, executors or administrators shall sustain or in anywise be put for by reason of the taking into his

possession, retention and sale of said property, claimed as aforesaid, then the above obligation to be void; otherwise to remain in full force and virtue.

THE FLATO COMMISSION CO.,
By ED H. REID,
Director, Agent and Representative.
THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,
By H. E. NEAL,
Vice-Prest.
Attest: CHAS. F. NEAL,
Asst. Secty.

[Endorsed]: No. 239. District Court, Third Judicial District, County of Ada, State of Idaho. William Finney, Plaintiff, vs. American Bonding Co. et al., Defendants. Complaint. Filed May 13th, 1904, 2:30 P. M. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk. W. E. Borah, Attorney for Pltff. Filed Sept. 12th, 1904. A. L. Richardson, Clerk.
(Caption Omitted.)

Summons.

The State of Idaho, Sends Greetings to the above-named Defendants.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the Third Judicial District, State of Idaho, in and for the County of Ada and to answer the complaint filed therein within ten days (exclusive of

the day of service) after the service on you of this summons, if served within this county; or if served out of this county, but in this district, within twenty days; otherwise within forty days. The said action is brought to recover from the defendants the sum of $9,048.00, on a certain indemnity bond made and entered into between the Flato Commission Company and the American Bonding and Trust Company of Baltimore City, to indemnify and save harmless the plaintiff herein, while performing certain duties as sheriff of Blaine County, Idaho, in taking into his possession, retaining and selling certain personal property mentioned in plaintiff's complaint, with interest on said sum of $9,048.00 at 7% per annum from June 17, 1903, for which sum plaintiff has become liable under the judgment of the district court of the Third Judicial District of Idaho, in and for Canyon County, in the case of Ralph Cowden vs. William Finney, which judgment was affirmed by the Supreme Court of Idaho, together with $542.90 costs and disbursements sustained by plaintiff in said action, with interest thereon at 7% per annum from June 17, 1903; for plaintiff's costs in this action and for all proper relief; all of which more fully appears in plaintiff's complaint, a copy of which is served herewith, hereby referred to and made a part hereof.

And you are hereby notified, that if you fail to appear and answer the said complaint, as above required, the said plaintiff, will take judgment for the sum demanded in the complaint, to wit: $9,590.90 with 7% interest thereon from June 17, 1903, and costs of suit.

Given under my hand and the seal of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada this 13th day of May, in the year of our Lord one thousand nine hundred and four.

[Seal] W. L. CUDDY,
Clerk.
By Otto F. Peterson,
Deputy Clerk.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 239. Summons. Wm. Finney, Plaintiff, vs. American Bonding Company of Baltimore, et al., defendants. Filed May 20, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. W. E. Borah, Attorney for Plaintiff. Filed Sept. 12, 1904. A. L. Richardson, Clerk.

Sheriff's Office,
County of Ada—,ss.

I hereby certify that I received the annexed Summons on the 13th day of May, 1904, and personally served the same on the American Bonding Company of Baltimore, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and the Flato Commission Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, by delivering to and leaving with Charles F. Neal, Statutory Agent of said American Bonding Company and Flato Commission Company in the County of Ada, State of Idaho, on the 17th day of May, 1904, a copy

of said summons together with a copy of the complaint in the action referred to in said summons.

Dated this 20th day of May, 1904.

J. D. AGNEW, Jr.,
Sheriff of Ada County,
By Elias Marsters,
Deputy.

Sheriff's Fees; $2.35.

(Caption Omitted.)

Notice of Petition for Removal.

To Hon. W. E. Borah, Attorney for Plaintiff:

You will please take notice that on the petition and bond, and the affidavit of Charles F. Neal, copies of which are herewith upon you served, the originals of which have been filed in the office of the Clerk of the District Court for the Third Judicial District of the State of Idaho in and for Ada County, and upon the summons, appearance and pleadings in said action, a motion will be made by the undersigned, on the 28th day of May, A. D. 1904, at two o'clock P. M. or as soon thereafter as counsel can be heard, at the courtroom in the courthouse in the said County of Ada, and will move that the said Court grant the said petition, and that said bond be accepted, and that said Court proceed no further in this suit.

NEAL & KINYON,
Attorneys for Defendant.

Boise, Idaho, May 27, 1904.

Due service of the within notice, and copies referred to herein, accepted this 27th day of May, 1904.

W. E. BORAH,
Attorney for Plaintiff.

Without waiver of his rights in the premises.

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(Caption Omitted.)

Petition for Removal of the American Bonding Company of Baltimore.

To the Honorable GEORGE H. STEWART, Judge of the District Court for the Third Judicial District of the State of Idaho, Within and for the County of Ada:

Your petitioner, The American Bonding Company, appearing especially herein for the sole purpose of this application only, respectfully shows unto the Court:

1st. That this defendant, the American Bonding Company of Baltimore, is a nonresident of the State in which said suit was brought, to wit, the said State of Idaho, and is a corporation organized under the laws of the State of Maryland.

2d. That the defendant, the Flato Commission Company, is a nonresident of the State in which said suit was brought, to wit, the said State of Idaho, and is a corporation organized under the laws of the State of Nebraska.

That service of summons has not been made upon said defendant, as will more fully appear by the affidavit of Charles F. Neal hereto attached and made a part hereof.

3d. That plaintiff was, at the time of bringing said suit, and still is, as this petitioner avers, a resident and citizen of the State of Idaho.

4th. That the matter and amount in dispute in said suit exceeds exclusive of interest and costs, the sum of two thousand ($2,000.00) dollars.

5th. That said suit is of a civil nature, and that plaintiff prays in his complaint in said suit, for judgment in the sum of $9,048.00 with interest thereon at the rate of seven per cent per annum from June 17th, 1903, and for the further sum of $542.90 for costs of this suit, against the American Bonding Company of Baltimore as surety, upon an alleged bond in the sum of ten thousand ($10,000.00) dollars, given to the plaintiff herein as sheriff of Blaine County, Idaho, under and by virtue of an affidavit on the foreclosure of a chattel mortgage given by one R. L. Shaw to the Flato Commission Company, defendant herein, and this defendant, the American Bonding Company of Baltimore, is the real party in interest herein, and the Flato Commission Company is, as this defendant believes, and therefore alleged, wholly insolvent and therefore not a real party in interest herein.

6th. That the controversy in suit is wholly between citizens of different states, as aforesaid, and your petitioner offers herewith a good and sufficient surety for their entering in the Circuit Court of the United States for the District of Idaho, on the first day of its next session, a copy of the records in this suit, and for paying all costs that may be awarded by said Circuit Court, if said

Court shall hold that this suit was wrongfully or improperly removed thereto.

7th. And your petitioner prays this Honorable Court to proceed no further herein, except to make an order of removal of this suit to said Circuit Court of the United States, to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States for the District of Idaho, and your petitioner will ever pray.

THE AMERICAN BONDING COMPANY OF BALTIMORE.

By NEAL & KINYON,
Its Attorneys.

State of Idaho,
County of Ada,—ss.

Charles F. Neal being first duly sworn, deposes and says: That he is an attorney and counselor of the Supreme Court of Idaho, and a member of the firm of Neal & Kinyon, who are the attorneys for the defendant in the above-entitled action, and has full authority to act for defendant in said matters; that he has read the above and foregoing petition, and that the same is true and correct; that his knowledge of the matters set forth in said petition is based in part upon his personal knowledge, and upon letters and dates furnished him by the defendant herein.

That none of the defendants herein are now in Ada County, Idaho, the place of residence of affiant.

CHARLES F. NEAL.

Subscribed and sworn to before me this 26th day of May, 1904.

[Seal] L. V. HOUSEL,
Notary Public.

(Caption Omitted.)

Affidavit of Charles F. Neal.

State of Idaho,
County of Ada,—ss.

Charles F. Neal, being first duly sworn, deposes and says that he is the Charles F. Neal, upon whom service was made as the designated, authorized agent of the Flato Commission Company defendant herein, in and for the State of Idaho.

He further states that he has never been appointed such agent, to the best of his knowledge and belief. Further, that he has made an examination of the records in the office of the Secretary of State in and for the State of Idaho; also in the office of the clerk of the District Court in and for the County of Ada, State of Idaho, and there is no designation of himself as the authorized agent of the Flato Commission Company at either of the above offices.

Further, that there is no designation of any authorized agent of the Flato Commission Company at either of the above offices.

He further states that he is not in any way authorized to accept or receive service, or do any act or things, for,

or on behalf of, defendant, the Flato Commission Company.

CHARLES F. NEAL.

Subscribed in my presence and sworn to before me this 26th day of May, A. D. 1904.

[Seal] L. V. HOUSEL,
Notary Public.

Bond on Removal.

Know all men by these presents, that we, The American Bonding Company of Baltimore, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and having a principal place of business in Baltimore, Maryland, as principal and The United States Guaranty Company, having an office and usual place of business at Boise City, in Ada County, State of Idaho, as surety, are held and firmly bound unto William Finney, late sheriff of Blaine County, Idaho, in the penal sum of five hundred ($5,000.00) dollars, for the payment whereof, well and truly to be made unto the said William Finney, late sheriff of Blaine County, Idaho, his successors and assigns, we bind ourselves, our and each of our successors, representatives and assigns, jointly and severally firmly by these presents.

Upon these conditions, that, whereas, the said American Bonding Company of Baltimore, having petitioned the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, Idaho, held in and for the County of Ada aforesaid, for the removal of

a certain cause therein pending, wherein the said William Finney, late sheriff of Blaine County, Idaho, is plaintiff, and the American Bonding Company of Baltimore, a corporation organized and existing under and by virtue of the laws of the State of Maryland; and the Flato Commission Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, are defendants, to the Circuit Court of the United States for the District of Idaho.

Now, if the said American Bonding Company of Baltimore, shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

In witness whereof the parties hereto have hereunto set their hands and seals this 27th day of May, A. D. 1904.

[Corporate Seal]

AMERICAN BONDING COMPANY OF BALTIMORE,

Principal.

By CHARLES F. NEAL,
General Agent and Attorney.

THE U. S. FIDELITY & GUARANTY CO.,

By C————.

(Caption Omitted.)

Demurrer.

The defendant, the American Bonding Company of Baltimore, demurs to plaintiff's complaint, on the following grounds:

1. That the plaintiff has not legal capacity to sue.

2. That there is defect of parties defendant, for the reason that there is no service of summons upon the defendant, the Flato Commission Company.

3. That the complaint does not state facts sufficient to constitute a cause of action.

THE AMERICAN BONDING COMPANY OF BALTIMORE,

By NEAL & KINYON,

Its Attorneys.

Due service of the within demurrer, with copy, accepted this 27th day of May, 1904.

W. E. BORAH,

Attorney for Plaintiff.

[Endorsed]: Omitting title and caption. Demurrer filed May 27th, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk. Neal & Kinyon, Attys. for Defendants. Filed Sept. 12th, 1904. A. L. Richardson, Clerk.

The foregoing six pages consisting of copy of notice of petition for removal, petition for removal and removal bond accompanying same, are in the originals bound in three seperate wrappers each endorsed as follows:

power to act for defendant in said matter: that he has read the above and foregoing plea to jurisdiction and that the same is true and correct: that his knowledge of the matters set forth in said petition is based in part on his own personal knowledge and upon letters and data furnished him by the defendant herein: that none of the defendants herein are now in Ada County, Idaho, the place of residence of affiant.

JAMES H. HAWLEY.

Subscribed and sworn to before me this 10th day of September, 1904.

O. ADAMS,
Notary Public.

I hereby certify that in my opinion the foregoing plea to the jurisdiction of the Court is well founded in point of law.

JAMES H. HAWLEY,
Counsel for Defendant, Flato Commission Company.

———

(Caption and Title Omitted.)

Affidavit of Charles F. Neal and James C. Dahlman Attached to Plea of Jurisdiction of Flato Commission Company.

Filed in Case No. ———. U. S. Circuit Court District of Idaho. September 12th, 1904.

State of Idaho.
County of Ada.—ss.

Charles F. Neal, being first duly sworn, deposes and says that he is the Charles F. Neal, upon whom service

was made as the designated, authorized agent of the Flato Commission Company defendant herein, in and for the State of Idaho.

He further states that he has never been appointed such agent, to the best of his knowledge and belief. Further, that he has made an examination of the records in the office of the Secretary of State in and for the State of Idaho; also in the office of the clerk of the District Court in and for the County of Ada, State of Idaho, and there is no designation of himself as the authorized agent of the Flato Commission Company at either of the above offices.

Further, that there is no designation of any authorized agent of the Flato Commission Company at either of the above offices.

He further states that he is not in any way authorized to accept or receive service, or do any act or thing for, or on behalf of defendant, the Flato Commission Company.

[Seal] CHARLES F. NEAL.

Subscribed in my presence and sworn to before me this 5th day of Sept., 1904.

L. V. HOUSEL.
Notary Public.

State of Nebraska,
County of Douglass.—ss.

James C. Dahlman, being first duly sworn, deposes and says that he is and has been for five years last past the duly authorized and acting secretary and for two years and five months the manager of the Flato Commission

Company, a Nebraska corporation, with its principal office at South Omaha, Nebraska.

He further states that he is the officer who has charge of the books and papers, and cares for the correspondence of the said Flato Commission Company, defendant herein. that he knows of his own knowledge that Charles F. Neal of Boise, Idaho, upon whom the purported service of summons was made in the above-entitled action as the duly authorized agent of defendant; the Flato Commission Company, is not and never has been the authorized agent of defendant the Flato Commission Company, and never has been authorized to do any business whatever for the said company as its agent.

Further that the Flato Commission Company, defendants herein has not and never has had an authorized statutory agent in the state of Idaho, as provided for in page 2653, Revised Statutes of 1887 of Idaho.

[Seal] JAMES C. DAHLMAN.

Subscribed in my presence and sworn to before me this 18th day of August, 1904.

J. F. POWERS,
Notary Public.

Service of copy of above and foreging admitted this 12th day of Sept., 1904.

W. E. BORAH.

Endorsement on Plea to Jurisdiction, and foregoing affidavits which were filed as one paper, as follows; (ommitting caption and title): No. ———. U. S. Circuit Court Central Division, District of Idaho. Plea to Juris-

diction of Flato Commission Company. Filed Sept. 12, 1904. A. L. Richardson, Clerk. Filed Sept. 22d, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

(Title and Caption Omitted.)

Order Remanding Cause.

On this day was announced the decision of the Court upon the motion to remand this cause heretofore argued and submitted, to the effect, that said motion be sustained and ordered that the above-entitled cause be, and the same is hereby, remanded to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

It is further ordered that the original papers herein transmitted to this Court by the District Court aforesaid be returned to the said District Court, together with the plea to jurisdiction filed in this Court by the Flato Commission Company.

United States of America,
District of Idaho,—ss.

I, A. L. Richardson, clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of order remanding cause No. 239, William Finney, late sheriff, etc. vs. American Bonding Company of Baltimore et al., has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in said district this 22d of September, 1904.

[Seal] A. L. RICHARDSON,
Clerk.
By ————————,
Deputy Clerk.

[Endorsed]: Order Remanding Cause. Filed Sept. 22, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

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(Title and Caption Omitted.)

Order Overruling Demurrer.

The demurrer in the above cause having been argued and taken under advisement, the same is this day overruled. It is therefore ordered and adjudged that the demurrer in the above-entitled cause be and the same is hereby overruled.

GEO. H. STEWART,
Judge.

[Endorsed]: Order Overruling Demurrer. Filed Nov. 26, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk.

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(Title and Caption Omitted.)

Stipulation Extending Time to File Answer.

It is stipulated and agreed that the defendant, the American Bonding Company, may have until Monday,

the 12th day of December, 1904, to file and serve its answer herein.

W. E. BORAH,
Attorney for Plaintiff.

Stipulation. Filed Feby. 7th, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk.

(Title and Caption Omitted.)

Answer.

Comes defendant, the American Bonding Company of Baltimore, and for its separate answer herein admits, alleges and denies as follows:

I.

Admits the allegations of paragraph 1 and 2 of said complaint.

II.

Answering paragraph 3 this defendant admits that defendant, the Flato Commission Company, on or about the 24th day of July, 1902, did file with plaintiff as sheriff of Blaine County, Idaho, an affidavit and notice in due form of law as required by the statutes of the State of Idaho, relative to the foreclosure of chattel mortgages under the process of "notice and sale," admits the execution of a bond, of which the copy annexed to said complaint is a substantial copy. Further says that this defendant has not information or belief sufficient to enable it to answer the other allegations of paragraph 3, to wit, that under and by virtue of the affidavit

and notice so executed by said Flato Commission Company, plaintiff took possession of 5,469 head of sheep, or any other number of sheep, branded as in said paragraph set out, or that all or any of said sheep were claimed by Ralph Cowden or by any other person as his separate and individual property, and therefore denies each and all of said allegations, and further alleges that if any sheep were taken by virtue of said writ which this defendant denies, they were the property of R. L. Shaw.

III.

Answering Paragraph 4 of said complaint this defendant admits the signing of the bond therein mentioned, and further answering denies that said bond was made, executed and delivered for the purposes in said paragraph set out, to wit: in order that plaintiff might hold said sheep, retain possession of the same and make sale thereto to satisfy the mortgage of the Flato Commission Company.

Further answering said paragraph 4, this defendant alleges the facts as to the execution of the same to be as follows: That when said affidavit and notice as mentioned aforesaid by plaintiff were delivered to plaintiff by the Flato Commission Company for service, in the manner provided by law, to wit, by levy, advertisement and sale, the plaintiff declined to serve the same by levying and taking into his possession the personal property therein described, or do any other thing whatever by law of him required until he had first been indemnified by defendant, the Flato Commission Company, with

an indemnity bond, conditioned as in said paragraph 4 set out.

That thereafter defendant, the Flato Commission Company, in order that it might have and receive at the hands of the said plaintiff, sheriff as aforesaid, the service and duty by him owing in the premises to the said Flato Commission Company, did, on said sheriff's demand, and refusal to act unless and until so indemnified, procure to be executed and delivered to the plaintiff as sheriff aforesaid a bond of indemnity conditioned in manner and form as aforesaid required by said plaintiff; that is to say, as in said paragraph 4 set out. That said bond of indemnity was not voluntary, but was coerced and extorted from said Flato Commission Company without authority of law, and in violation of law, and was so executed solely in order that said Flato Commission Company might require and have at the hands of plaintiff, as sheriff aforesaid, service and duty which he by law was required to render to said Flato Commission Company upon payment or tender of his lawful fees therefor, which fees were then and there tendered and paid, and said Flato Commission Company was entitled to said service without any other or further requirement or demand whatsoever on the part of said plaintiff, sheriff as aforesaid. That said bond was taken by said plaintiff as sheriff aforesaid under color of his office of sheriff as aforesaid, and is wholly unauthorized by law and is wholly without consideration and is void and illegal, wherefore, this defendant ought not to be charged and holden on the same.

IV.

Answering paragraph 5 defendant denies that said bond was executed for the consideration of the retention of possession of said sheep by plaintiff, as sheriff aforesaid; denies that said sheep were levied upon at the instance or request, or under the advice or authority of this defendant; and further answering alleges the fact with reference to the surroundings of the execution and giving of said bond are as set forth in paragraph 4 of this answer.

V.

Answering paragraph 6 of said complaint, this defendant says that he has not sufficient information or belief to enable it to answer the allegations of paragraph 6: That one Ralph Cowden had commenced an action against plaintiff as sheriff of Blaine County, Idaho, and had recovered judgment in the District Court of the Third Judicial District of Idaho, in and for Canyon County, Idaho, for the sum of $8,787.24, and for costs amounting to $250.00, and wherein it was ordered and adjudged that said Cowden have a return of the property described in said affidavit and notice, and so as alleged, claimed by said Cowden, or in lieu thereof his damage in the said sum of $8,798.24 and costs in the sum of $250.00, nor of any other judgment for return of property or damages or costs in said matters, nor of the affirmance of any such judgment, or any judgment in the premises, on appeal in the supreme Court of Idaho. Nor of the fact of plaintiff herein being liable to Ralph Cowden, in the sums as in said paragraph 6 alleged, or any other sum or

sums of money by reason of such alleged judgment; nor of there being any judgment as alleged by plaintiff growing out of the matters alleged in said complaint, and for this reason denies the same.

Further answering said paragraph 6 this defendant denies that plaintiff herein appeared in any such alleged suit, and contested the same at the instance or at the request, or with the full knowledge or any knowledge, or with notice to, or with the consent of, or by the advice of this answering defendant.

VI.

Answering paragraph 7 of the complaint herein, this defendant denies that the conditions of said indemnity bond have been broken; denies that this defendant is liable to plaintiff because of the execution of said alleged bond, and by virtue of the terms and conditions thereof in the sum of $8,798.24, principal and interest, and the further sum of $250.00 costs, with interest on said amounts as in said paragraph 7 alleged or in any other sum or sums.

VII.

Answering the allegations of paragraph I of the second cause of action of plaintiff's complaint, adopting the allegations of paragraphs 1, 2, 3, 4, 5, 6 and 7 of first cause of action as a part of the second cause of action, this defendant adopts his answer to the aforesaid seven paragraphs comprising the first cause of action as fully as though they were fully in this paragraph repeated and set forth.

VIII.

Answering the allegations of paragraph 2 of second cause of action, this defendant says that it has not information or belief sufficient to enable it to answer the allegations of said paragraph 2, to wit: That plaintiff, in contesting said alleged action, referred to in the first cause of action set forth in said complaint, has paid out, contracted for and become liable for costs and expenses in traveling, and attorneys' fees in the total sum of $542.90 as in said paragraph 2 set out, or any part thereof, and therefore denies the same.
of.

Second Defense.

For a further and second defense this defendant says that it adopts the allegations or paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of its answer herein as fully as though herein fully set out, and says that under said facts the bond sued on in this action is without valid consideration, was coerced and extorted from defendant, the Flato Commission Company, was so taken and required without authority of law; and contrary to both the statute and the policy of the law, and plaintiff is not entitled to recover thereon against this defendant.

Third Defense.

For a third and further defense this defendant says that the complaint herein does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

Wherefore, this answering defendant asks that this

action be dismissed as against it, and that it recover its costs herein expended.

NEAL & KINYON,
Attorneys for American Bonding Company.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being first duly sworn, deposes and says that he is one of the attorneys in the above-entitled action for defendant, the American Bonding Company of Baltimore, that he has read the foregoing answer, knows the contents thereof, and that the facts therein stated are true of his own knowledge except as to the matters therein stated to be on information and belief, and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that defendant, the American Bonding Company of Baltimore, is a corporation and absent from the county where the attorney resides and where the suit is filed.

B. F. NEAL.

Subscribed and sworn to before me this 12th day of December, A. D. 1904.

[Seal] L. V. HOUSEL,
Notary Public.

[Endorsed]: Answer. Filed Dec. 12, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk.

(Title and Caption Omitted.)

Motion to Quash Service of Summons.

Comes now the defendant, The Flato Commission Company, above named, and specially appearing for the purpose of this motion, and for no other purpose, moves to set aside and quash the service of the summons herein upon this defendant, upon the grounds and for the reasons:

1. That the pretended service of summons in this cause upon this defendant is not a legal or proper service of summons, or a service at all, in this; that Charles F. Neal mentioned in the return of the sheriff herein as the person upon whom said service was made in behalf of this defendant, and as the statutory agent thereof, was not and is not, and never was the agent or representative, either statutory or otherwise, of this defendant, and has never at any time acted as such, or been appointed as such agent or representative under the laws of the State of Idaho, or otherwise, as shown by the affidavits of Charles F. Neal and James C. Dahlman, and the certificate of the Secretary of the State of Idaho, a copy of each of which is herewith served and made a part hereof.

2. That this motion is based upon said summons, the return of the sheriff, the affidavits of Charles F. Neal and James C. Dahlman, attached to the plea to the jurisdiction filed herein and the certificate of the Secretary

of the State of Idaho, the originals of which are filed herein, and a copy of which is herewith served.

HAWLEY, PUCKETT & HAWLEY,
Attorneys for the Flato Commission Company, a Corporation.

———

(Title and Caption being Omitted.)

Affidavit of Charles F. Neal.

State of Idaho,
County of Ada,—ss.

Charles F. Neal, being first duly sworn according to law, deposes and says:

That during the day May 17, A. D. 1904, at my offices in the Sonna Building, and in room 305 of said building, Boise, Idaho, Elias Marsters, a then deputy marshal of Ada County, Idaho, served on me one copy of summons and one copy of compliant in the case of J. C. Mills, Jr., Late Sheriff of Boise County, Idaho, Plaintiff, vs. American Bonding Company of Baltimore, a Corporation, organized and existing under and by virtue of the laws of the State of Maryland, and the Flato Commission Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska; also one copy of summons and one copy of complaint in the case of William Finney, late sheriff of Blaine County, Idaho, plaintiff, against the same defendants, which cases were then pending in the District Court of the Third Judicial District of the State of Idaho in and for Ada County.

On this particular date I was the duly authorized statutory agent of the American Bonding Company of Baltimore, having been appointed under the provisions of section 2653 of the Revised Statutes of Idaho, as amended by an act approved March 10, 1903, and my appointment having been filed as required by law.

Mr. Elias Marsters first served the papers on me against the American Bonding Company of Baltimore, of which I acknowledged service in each of the above-entitled cases for the American Bonding Company of Baltimore. He then attempted to serve on me the copies of two summons and complaint against the Flato Commission Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska as set out in the complaints in these actions. I then and there told deputy sheriff Elias Marsters that I was not the statutory agent of the Flato Commission, that I never had been the statutory agent of the Flato Commission Company, nor had I ever represented the Flato Commission Company in any capacity. Mr. Elias Marsters then asked me if I knew who was the statutory agent of the Flato Commission Company, to which question I answered that I did not know, but that as Messrs. Hawley & Puckett, attorneys of this city, had heretofore represented to my personal knowledge the Flato Commission Company as their attorney, in other suits, that they, Hawley & Puckett, could probably inform him who the statutory agent for this State is. Mr. Elias Marsters, deputy sheriff, left no papers with me other than one copy of summons and one copy of

complaint in each of the cases hereinabove described against the American Bonding Company of Baltimore, Maryland.

The foregoing copy of summons and complaint in the case of J. C. Mills, Jr., vs. American Bonding Company of Baltimore et al., and the copy of summons and complaint of William Finney vs. American Bonding Company of Baltimore et al., which were served on me as statutory agent of the American Bonding Company, were the only papers served on me, and the only papers left with me on the date in question, or at any other time by the said Elias Marsters, or any other person in connection with process in these cases.

And further affiant deposes and says that he has personally made a diligent search of the records in the office of the Secretary of State of the State of Idaho, and that he fails to find that the Flato Commission Company, a corporation organized under the laws of the State of Nebraska, and one of the defendants herein, had filed any authorization of statutory agent under the provisions of section 2653 of the Revised Statutes of the State of Idaho, as amended by an act approved March 10, 1903, or has it filed any papers whatever in the said office.

And further affiant saith not.

CHARLES F. NEAL.

Subscribed and sworn to before me this 31st day of January, A. D. 1905.

[Seal] L. V. HOUSEL,
Notary Public.

Certificate of Secretary of State.

STATE OF IDAHO,

OFFICE OF THE SECRETARY OF STATE.

I, Will H. Gibson, Secretary of State of the State of Idaho, and custodian of the records of corporations, do hereby certify: That I have made a diligent search of the records in my office, and fail to find that the

FLATO COMMISSION COMPANY,

a corporation reputed to be organized under the laws of the State of Nebraska, has complied with section 2653 of the Revised Statutes of the State of Idaho, as amended by an act approved March 10th, 1903, by filing in this department the articles of incorporation duly certified to by the proper authorities, and an instrument designating statutory agent and principal place of business within this state.

In witness whereof, I have hereunto set my hand and affixed the Great Seal of the State.

Done at Boise City, the capitol of Idaho, this 27th day of January, in the year of our Lord one thousand nine hundred and five and of the Independence of the United States of America, the one hundred and twenty-ninth.

[Seal] WILL H. GIBSON,
Secretary of State.

Motion to Quash.

Service accepted and motion waived.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 1, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. Hawley, Puckett & Hawley, Attys. for Flato Com. Co., Defendants.

J. C. MILLS
vs.
AMERICAN BONDING CO. et al., } Civil Trial No. 25.

and

WILLIAM FINNEY
vs.
AMERICAN BONDING CO. et al., } Civil Trial No. 26.

Certified Copies of Certain Orders of District Court.

In these cases the motion of the defendant, the Flato Commission Co., to quash service of summons as to said Flato Commission Co., were sustained. Whereupon the defendant, American Bonding Co., presented its motions for the removal of the cases to the United States Court. The Court declined to rule on the motions for removal till some action is taken in the matter by the U. S. Court. Counsel for the plaintiffs duly excepted to the ruling of the Court in sustaining the motions of the defendant, the Flato Commission Co., to quash service of summons as to said Flato Commission Co.

State of Idaho,
County of Ada,—ss.

I, W. L. Cuddy, clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the

County of Ada, do hereby certify that the above and foregoing is a true and complete copy of the orders of the Court, made in the above-entitled cases on February 4, 1905, as the same appears of record in Journal "K" of the District Court, at page III.

Witness my hand and the seal of said Court this 7th day of February, A. D. 1905.

[Seal] W. L. CUDDY,
Clerk District Court, Ada County, Idaho.
By Otto F. Peterson,
Deputy.

———

(Title and Caption Omitted.)
State of Idaho,
County of Ada,—ss.

I, W. L. Cuddy, clerk of the District Court in and for Ada County, Idaho, hereby certify that the original summons issued herein on the 13th day of May, 1904, is the only summons that has been issued out of my office at the time of the quashing of the service of summons as to the Flato Commission Company, defendant in the above-entitled action, and that no alias summons had issued out of said court at the time of the filing of petition and bond for removal in this cause under date of February 4, 1905.

[Seal] W. L. CUDDY,
Clerk District Court.
By Otto F. Peterson,
Deputy.

(Title and Caption Omitted.)

Petition for Removal of the American Bonding Company of Baltimore.

Your petitioner, the American Bonding Company of Baltimore, respectfully shows to this Honorable Court that it is one of the defendants in this action, which is of a civil nature, and the matter and amount in dispute in this cause exceeds in value the sum of two thousand dollars, exclusive of interest and fees; and (2) that the controversy herein is between citizens of different States; that the plaintiff was at the time of the beginning of this action, and still is, a citizen of the State of Idaho, residing in Blaine County in said State; that your petitioner, the American Bonding Company of Baltimore, was, at the commencement of this action, and still is, a citizen of the State of Maryland, and of no other State residing at Baltimore City in said State; (3) that the Flato Commission Company, defendant herein, is a corporation, and was at the commencement of this suit, and still is, a citizen of the State of Nebraska and of no other State, residing at South Omaha in said State; and that your petitioner, the American Bonding Company of Baltimore, desires to remove this suit before the trial thereof, into the next Circuit Court of the United States to be held in the District of Idaho, Central Division.

II.

Your petitioner, the American Bonding Company of Baltimore, further states that the Flato Commission Company has not now, and has never had, a statutory agent

for the purpose of service of summons, as required by section 2653, Revised Statutes of 1887, and acts amendatory thereof; and further represents and states to this court upon information and belief that the Flato Commission Company is not now, nor has it for more than two years last past, and since long prior to the beginning of action herein, been doing any business of any kind whatever in the State of Idaho, and has no resident agents or representatives therein, and has had no agents or representatives within the State of Idaho since long prior to the beginning of suit herein upon whom service of summons could be had, which fact has been well known to plaintiff herein, as this petitioner is informed and believes and therefore alleges on information and belief. Your petitioner, the American Bonding Company of Baltimore, further alleges that the return of service of summons in this case as served upon Charles F. Neal, as statutory agent of the Flato Commission Company is false and untrue and was made, as this petitioner is informed and believes, and therefore alleges on information and belief, made fraudulently, falsely and corruptly, with the intent and for the purpose of defeating the jurisdiction of the Circuit Court of the United States, and prevent a removal of said cause by this petitioner. Your petitioner alleges that in truth and in fact no service of summons was made upon Charles F. Neal as statutory agent of the Flato Commission Company, and that the return herein of service upon said Charles F. Neal as statutory agent of the Flato Commission Company is false and untrue, and was made and caused to be made for the sole purpose

and with the intent of preventing and defeating the right of this petitioner, the American Bonding Company of Baltimore, to remove this cause into the Circuit Court of the United States, for the District of Idaho, Central Division.

III.

Your petitioner further states that it heretofore, on the 27th day of May, 1904, and within the time allowed by law, filed a petition for removal of this cause to the United States Circuit Court for the District of Idaho, Central Division, and that said cause was removed to said Court, and that, thereafter, on or about the 13th day of September, 1904, said cause was, by the judge of the said Circiut Court of the United States within and for the State of Idaho, remanded to the District Court of the Third Judicial District of the State of Idaho in and for Ada County, for the reason that it appeared that there was in the record a service of summons upon Charles F. Neal as statutory agent of defendant the Flato Commission Company regular upon its face, and such defendant the Flato Commission Company had not joined in the removal of said cause, and for this reason said cause was held not to be a removable cause at said time and said cause was remanded to this Court for further proceedings; further that on the 4th day of February, 1905, upon the application of the Flato Commission Company, the said Flato Commission Company appearing specially for the sole purpose of quashing the service of summons so as aforesaid returned as made by serving summons upon the said Charles F. Neal as and for the duly authorized statu-

tory agent of said defendant the Flato Commission Company, and on the said 4th day of February, 1905, said Flato Commission Company was dismissed from said cause and said service of summons quashed and this cause is for the first time pending as against defendant, the American Bonding Company of Baltimore solely. In support of this application for removal petitioner refers to and makes a part hereof the following, to wit, the application for removal filed by petitioner under date of May 27th, 1904, in this Court, the plea to the jurisdiction of the United States Circuit Court filed by the Flato Commission Company in the United States Court and returned with the papers to this Court, the motion to quash service of summons as to the Flato Commission Company, filed by the Flato Commission Company herein with all affidavits, certificates and exhibits attached to said several papers and therein referred to. And your petitioner offers herewith a bond with good and sufficient surety conditioned according to law, for its entering in the Circuit Court of the United States for the District of Idaho, copy of the records in this suit, and for paying all costs that may be awarded by said Court if said Court shall hold that this suit is wrongfully and improperly removed thereto; and your petitioner prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept such

surety bond and to cause the record herein to be removed to the said Circuit Court of the United States for the District of Idaho, and he will ever pray.

AMERICAN BONDING COMPANY OF BALTIMORE,

By NEAL & KINYON,
Its Attorneys.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being duly sworn, deposes and says: That he is one of the attorneys for petitioner in above-entitled action; that he has read the above and foregoing petition for removal, knows the contents thereof, and that the facts stated therein are true of his own knowledge, except as to matters therein stated to be on information and belief and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that the petitioner herein is absent from the county where the attorney resides and where the suit was filed.

B. F. NEAL.

Subscribed and sworn to before me this 4th day of Feb., 1905.

[Seal]

W. L. CUDDY,
Clerk District Court.
By Otto F. Peterson,
Deputy.

[Endorsed]: Petition for Removal. Filed Feby. 4th, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

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(Title and Caption Omitted.)

Bond on Removal.

State of Idaho,
County of Ada,—ss.

Know all men by these presents, that we, The American Bonding Company of Baltimore, Maryland, and The Flato Commission Company, a corporation organized and existing under the laws of the State of Nebraska, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are holders and stand firmly bound unto William Finney, in the penal sum of three hundred ($300.00) dollars, for the payment whereof well and truly to be made unto the said William Finney, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns jointly and firmly by these presents.

Upon condition nevertheless, that whereas the said American Bonding Company, and The Flato Commission Company have filed their petition in the District Court of the 3d Judicial District in and for Ada County, Idaho; for the removal of a certain cause therein pending, wherein the said William Finney, is plaintiff and the said American Bonding Company and the Flato Commission Company are defendants, to the United States District Court for the District of Idaho, Central Division.

Now, if the said American Bonding Company, and the Flato Commission Company shall enter in the said District Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, we, the said American Bonding Company and The Flato Commission Company, and The United States Fidelity and Guaranty Company have hereunto set our hands and seals this 4th day of February, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,

By NEAL & KINYON,
Attys.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Seal] By CLAUDE H. ROBERTS,
Its Attorney in Fact.

[Endorsed]: Bond for Removal. Filed February 4, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

Boise City, Idaho, February 4, 1905.

Eleventh Judicial Day of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County. Present: Hon. GEORGE H. STEWART, District Judge, and the Officers of the Court.

Whereupon, among others, the following proceedings were had, to wit:

J. C. MILLS
vs.
AMERICAN BONDING CO. et al. } Civil Trial No. 25.

and

WILLIAM FINNEY,
vs.
AMERICAN BONDING CO. et al. } Civil Trial No. 26.

Trial.

In these cases the motion of the defendant, the Flato Commission Co., to quash service of summons as to said Flato Commission Co. were sustained. Whereupon the defendant American Bonding Co. presented its motions for the removal of the cases to the United States Court. The Court declined to rule on the motions for removal till some action is taken in the matter by the U. S. Court. Counsel for the plaintiff duly excepted to the ruling of the Court in sustaining the motions of the defendant, the Flato Commission Company, to quash service of summons as to said Flato Commission Company.

February 16, 1905.

J. C. MILLS, Jr.
vs.
AMERICAN BONDING CO. et al. } Civil Trial No. 25.

Trial (Continued).

This cause came on for trial before the Court and a jury, Messrs. W. E. Borah and H. L. Fisher appearing as counsel for the plaintiff, Messrs. Neal & Kinyon appearing for the defendant, the American Bonding Co., and Messrs. Hawley, Puckett & Hawley ,appearing for the defendant, the Flato Commission Co.

Counsel for the defendants, at this time, before the jury was impaneled, but after the case was called for trial, objected to going to trial at this time and filed their petitions and bond for removal to the Federal Court.

Whereupon the Court overruled the objection of defendants, and ordered that the trial of the cause be proceeded with, to which ruling of the Court counsel for defendants excepted.

The clerk under the direction of the Court proceeded to draw from the jury-box the names of twelve persons, one at a time, written on separate slips of paper and folded, to serve as a jury in this cause.

Gardner Adams, whose name was drawn from the jury-box, who was sworn on voir dire and examined for cause by counsel for plaintiff and defendants, was excused for implied bias.

J. H. Wickersham and H. C. Branstetter, persons whose names were drawn from the jury-box, who were sworn on voir dire, examined and passed for cause by counsel for both plaintiff and defendant, were excused by the Court on defendant's peremptory challenge.

Following are the persons whose names were drawn from the jury-box, who were sworn on voir dire, examined, passed for cause and accepted by counsel for both plaintiff and defendant, and who were sworn by the clerk to well and truly try said cause and a true verdict render therein, according to the law and the evidence, to wit:

Green C. Patton, George Stewart, James L. Yost, Jeff. Davis, Frank E. McMillan, Porter Crabb, S. F. Russell, John Hall, George Bayhouse, J. C. Pence, Charles Lyon and W. H. McMillan.

A statement of the cause was made to the jury by counsel for plaintiff, and thereupon J. C. Mills, Jr., Will H. Gibson, John A. Tucker, Ralph Cowden, H. S. Worthman and Charles F. Neal were sworn and examined as witnesses on the part of plaintiff, documentary and record evidence being introduced by plaintiff, and here plaintiff rests.

Counsel for the defendant, the American Bonding Co., at this time moved the Court to instruct the jury to return a verdict in favor of the defendants, for the reason that the evidence introduced was not sufficient to warrant a verdict in favor of plaintiff, which motion was overruled by the Court, to which ruling of the Court, counsel for defendant excepted.

Defendants declining to introduce any evidence, the cause was argued before the jury by H. L. Fisher, Esq., of counsel for plaintiff, and submitted to the jury for decision.

The Court, after instructing the jury, placed them in the charge of W. C. Lane, a bailiff first duly sworn, and they retired to deliberate upon their verdict.

On this same day came the jury into court, the counsel for plaintiff and defendants being present, the jury was called and all found present.

The Court asked the jury if they had agreed upon a verdict and they, through their foreman, presented to the Court their written verdict.

This verdict not being in due form, the Court after giving jury further instructions in writing, directed them to correct their verdict, and they again retired in the charge of the bailiff.

Counsel for plaintiff and defendant being present, the jury was returned into court, and being called, all were found present.

The Court asked the jury if they had agreed upon a verdict, and they, through their foreman, answered that they had, and presented to the Court their written verdict in the words and figures following, to wit:

"In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

J. C. MILLS, Jr., Sheriff,
Plaintiff,
vs.
AMERICAN BONDING CO., OF BALTIMORE, and FLATO COMMISSION CO.,
Defendants.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages against the American Bonding Company of Baltimore at the sum of $21,593.71.

J. C. PENCE,
Foreman."

The verdict was recorded in the presence of the jury by the clerk and then read to them and they each confirmed the same.

The Court excused the jury from a further consideration of the case and till 10 A. M. February 17, 1905.

State of Idaho,

County of Ada,—ss.

I, W. L. Cuddy, Clerk of the District Court in and for the Third Judicial District, State of Idaho, within and for the County of Ada, hereby certify that the within and foregoing transcript, composed of ——— pages, and containing the complaint with all exhibits thereto, the

summons with return thereon, the notice of petition of removal, filed by the American Bonding Company of Baltimore, under date of May 27th, 1904, together with the petition for removal and all affidavits and showings thereto attached, and the bond for removal, filed by the said American Bonding Company of Baltimore, on the above day and date, the demurrer to the complaint filed by the American Bonding Company on the same day and date, the plea to jurisdiction, as to the Flato Commission Company, filed as shown by endorsement thereon, in the United States Circuit Court in the District of Idaho, filed on Sept. 12, 1904, and in this Court Sept. 22, 1904, together with all affidavits and other showings thereto attached, the order remanding said cause to this Court, entered Sept. 22, 1904, and filed in this Court on the same date, order overruling demurrer of defendant, American Bonding Company, stipulation for answer as to American Bonding Company, answer of the American Bonding Company, motion to quash service of summons, by the Flato Commission Company, filed January 31, 1905, with affidavits and certificates thereto attached, minutes of the court, under date of Feb. 4, 1905, and Feb. 16, 1905, relating to the foregoing case, petition for removal filed by the American Bonding Company of Baltimore, on Feb. 4, 1905, bond accompanying same, together with the filings of said several papers, in this office, as shown by endorsements on said civil papers, and that the within and foregoing are all of the files in the case of William Finney, Late Sheriff of Blaine County, Idaho, vs. The American Bonding

Company of Baltimore et al., except the petition for removal filed February 16, 1905, by the American Bonding Company of Baltimore, and also by the Flato Commission Company, on the same date, and the bond for removal filed jointly by said defendants on the same date, which original papers are herewith transmitted, and except all subpoenas issued in this action, and also all motions, affidavits, and other matters, relating to the question of costs, only.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 13th day of March, A. D. 1905.

[Seal] W. L. CUDDY,
Clerk of the District Court.
By Otto F. Peterson,
Deputy.

[Endorsed]: No. 250. U. S. Circuit Court, Central Division, District of Idaho. Wm. Finney vs. American Bonding Company et al. Transcript. Filed March 13th, 1905. A. L. Richardson, Clerk.

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(Title and Caption Omitted.)

Petition for Removal of American Bonding Company of Baltimore.

Your petitioner, the American Bonding Company of Baltimore, respectfully shows to this Honorable Court that it is one of the defendants in this action, which is of a civil nature, and the matter and amount in dispute

in this cause exceeds in value the sum of two thousand dollars, exclusive of interest and fees; and (2) that the controversy herein is between citizens of different States; that the plaintiff was at the time of the beginning of this action, and still is, a citizen of the State of Idaho, residing in Blaine County, in said State; that your petitioner, the American Bonding Company of Baltimore was, at the commencement of this action, and still is, a citizen of the State of Maryland, and of no other State, residing at Baltimore City in said State; (3) that the Flato Commission Company, defendant herein, is a corporation, and was at the commencement of this suit, and still is, a citizen of the State of Nebraska and of no other State, residing at South Omaha in said State; and that your petitioner, the American Bonding Company of Baltimore, desires to remove this suit before the trial hereof, into the next Circuit Court of the United States to be held in the District of Idaho, Central Division.

II.

Your petitioner, the American Bonding Company of Baltimore, heretofore on the 27th day of May, 1904, and within the time to plead, filed its petition for removal of this cause into the Circuit Court of the United States for the District of Idaho, which petition was denied by the Circuit Court of the United States for the District of Idaho, on or about the 13th day of September, 1904, that being a day of the next succeeding term of the Circuit Court, and said cause was by said Circuit Court remanded to the District Court in and for Ada County,

Idaho, for the reason that the Flato Commission Company, codefendant herein, was a party in said cause and had not joined in asking for the removal of the same and had been regularly served with summons as shown by the records of said court; that thereafter on the 1st day of February, 1905, the Flato Commission Company appeared specially in this court for the sole purpose of challenging the jurisdiction of this court over it and filed its motion to quash the service of summons which had been theretofore returned as made upon Charles F. Neal statutory agent of defendant, the Flato Commission Company, and which return of service appeared of record at the time of remanding of said cause from the Circuit Court of the United States as aforesaid, which said motion to quash was on the 4th day of February, 1904, argued in this court and sustained.

That immediately after the quashing of summons as against defendant, the Flato Commission Company, plaintiff herein in open court directed that alias summons issue for service upon said defendant The Flato Commission Company, and immediately thereafter and prior to the issuance of such alias summons, the defendant, the American Bonding Company of Baltimore, filed its petition for removal to this cause in the Circuit Court of the United States for the District of Idaho, which petition was as aforesaid filed on the 4th day of February, 1905, and was argued before the Hon. James H. Beatty, Judge of the Circuit Court of the United States, District of Idaho, on the 7th day of February, 1905, and said cause was remanded for the reason that

the proceedings before that Court show that there was process outstanding at the time of hearing as against the defendant the Flato Commission Company.

III.

Further, that on the said 7th day of February, 1905, the alias summons as aforesaid issued out of this court on the 4th day of February, 1905, for service upon defendant the Flato Commission Company, was served upon said defendant under and by virtue of the provisions of section 4144 of the Revised Statutes of Idaho and acts amendatory thereof by delivering a true copy of alias summons and copy of complaint herein to William Cuddy Auditor of Ada County, Idaho.

That this defendant, the American Bonding Company of Baltimore, has taken no other or further steps herein of any kind whatever except only the removal proceedings herein referred to, since the quashing of summons aforesaid on the 4th day of February, 1905, as to defendant the Flato Commission Company, and no action whatever in said cause since it came to the knowledge of said American Bonding Company of Baltimore that service of summons as aforesaid had been had upon the Flato Commission Company, except only to object to the jurisdiction of this court to try this cause prior to the expiration of the time in which defendant, the Flato Commission Company, was by law required to plead herein.

Your petitioner offers herewith a bond with a good and sufficient surety conditioned according to law, for

its entering in the Circuit Court of the United States for the District of Idaho, a copy of the records in this suit, and for paying all costs that may be awarded by said Court if said Court shall hold that this suit is wrongfully and improperly removed thereto; and your petitioner prays this Honorable Court to proceed no further therein, except to make an order of removal required by law, and to accept such surety bond and to cause the records herein to be removed to said Circuit Court of the United States for the District of Idaho, and he will ever pray.

AMERICAN BONDING COMPANY OF BALTIMORE,

By NEAL & KINYON,
Its Attorneys.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being duly sworn, deposes and says: That he is one of the attorneys for petitioner in above-entitled action; that he has read the above and foregoing petition for removal, knows the contents thereof, and that the facts stated therein are true of his own knowledge except as to matters therein stated to be on information and belief and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that the petitioner herein is absent from the county where the attorney resides and where the suit was filed.

B. F. NEAL.

Subscribed and sworn to before me this 13th day of February, 1905.

[Seal] L. V. HOUSEL,
Notary Public.

[Endorsed]: Title and Caption Omitted. Petition for Removal. Filed Feb. 16, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. Filed March 13, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Petition for Removal of the Flato Commission Company.

Your petitioner, the Flato Commission Company, respectfully shows to this Honorable Court that it is one of the defendants in this action, which is of a civil nature, and the matter and amount in dispute in this cause exceeds in value the sum of two thousand dollars, exclusive of interest and fees; and (2) that the controversy herein is between citizens of different states; that the plaintiff was at the time of the beginning of this action and still is a citizen of the State of Idaho, residing in Blaine county, in said State. That your petitioner, the Flato Commission Company, is a corporation and was at the commencement of this action and still is, a citizen of the State of Nebraska and of no other States, residing at South Omaha, in said State. That the American Bonding Company of Baltimore, defendant herein, is a corporation, and was at the commencement of this suit, and still is, a citizen of the State of Maryland, re-

siding at Baltimore in said State, and that your petitioner, the Flato Commission Company, desires to remove this suit before the trial court thereof into the next Circuit Court of the United States to be held in the District of Idaho.

II.

And your petitioner offers herewith good and sufficient surety for his entering in the Circuit Court of the United States for the District of Idaho, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully and improperly removed thereto.

In support of this its application for removal petitioner attached hereto and makes a part hereof, a copy of summons served upon William Cuddy, Auditor of Ada County, Idaho, with affidavit of said Cuddy as to service made.

And your petitioner therefore prays that said surety and bond may be accepted; that this suit may be removed in the next Circuit Court of the United States to be held in the District of Idaho pursuant of the statutes of the United States in such cases made and provided, and that no further proceedings may be had herein in this court, and it will ever pray.

FLATO COMMISSION COMPANY.
By HAWLEY, PUCKETT & HAWLEY,
Its Attorneys.

State of Idaho,
County of Ada,—ss.

Jess Hawley, being first duly sworn, deposes and says that he is one of the attorneys for petitioner in above-entitled action, that he has read the above and foregoing petition for removal, knows the contents thereof and that the facts therein stated are true of his own knowledge except as to matters therein stated to be on information and belief, and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that petitioner is absent from the county where the attorney resides and where the suit was filed.

JESS HAWLEY.

Subscribed and sworn to before me this 13th day of February, 1905.

OTTO PETERSON,
Clerk of Court.

[Endorsed]: Title of Caption Omitted. Filed Feb. 16, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk. Filed March 13th, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Bond on Removal.

Know all men by these presents, that we, the American Bonding Company of Baltimore, Maryland, a corporation organized and existing under and by virtue of

the laws of the State of Maryland, and the Flato Commission Company, a corporation organized under and by virtue of the laws of the State of Nebraska, as principals, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are holden and firmly bound unto William Finney, in the penal sum of five hundred ($500.00) dollars, for the payment of which well and truly to be made unto the said William Finney, his heirs, representatives and assigns, we bind ourselves and each of our representatives and assigns, jointly and severally by these presents.

Upon the conditions, nevertheless, that whereas, the said American Bonding Company of Baltimore, and the said Flato Commission Company, have filed their respective petitions, in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, for the removal of a certain action therein pending, wherein the said William Finney, is plaintiff and the said American Bonding Company of Baltimore and the said Flato Commission Company, are defendants, to the Circuit Court of the United States for the District of Idaho.

Now, therefore, if the said American Bonding Company of Baltimore and the said Flato Commission Company, shall enter in the said Circuit Court of the United States on the first day of the next succeeding term, a copy of the records in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if the said Court shall hold that said suit was wrongfully or improperly removed

thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, we, the said American Bonding Company of Baltimore, the said Flato Commission Company and the United States Fidelity and Guaranty Company have hereunto set their hands and seals this 16th day of February, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,
BY NEAL & KINYON,
Its Attorneys,
FLATO COMMISSION COMPANY,
By HAWLEY, PUCKETT & HAWLEY,
[Corporate Seal] Its Attorneys.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By CLAUDE H. ROBERTS,
Its Attorney in Fact.

[Endorsed]: Title and Caption Omitted. Removal Bond. Filed Feb. 16, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk. Filed March 13th, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Affidavit of W. E. Borah.

State of Idaho,
County of Ada,—ss.

W. E. Borah, being duly sworn, deposes and says: That he is one of the attorneys for the above-named plaintiff. That the time for the defendant, the American Bonding Company, to appear and answer under the summons in the above cause was May 27, 1904, and at said time the said American Bonding Company appeared and filed its general demurrer in said court. That thereafter the American Bonding Company through its attorneys on or about November 26, 1904, appeared in said court and argued the demurrer to the complaint, and that thereafter the Court rendered a written opinion upon said demurrer and overruled the same on or about November 26, 1904. That at the time of said appearance and argument of said demurrer no objection was raised to the jurisdiction of said state court. That after overruling said demurrer and without any objection upon the part of the American Bonding Company, said company through its attorneys entered into a written stipulation for the time in which to answer and thereafter having taken the time covered by said stipulation filed their answer upon December 12, 1904, in said court and did not object at said time to the jurisdiction of the court or file said answer under protest. That thereafter and on or about the 25th day of January, 1905, counsel for both plaintiff and

defendant being present in said court, the cause was by consent of both parties through their counsel set for trial February 4, 1905, and the said case was set without any protest upon the part of the American Bonding Company or objection to the jurisdiction of said Court. That thereafter and on or about February 17, 1905, the cause proceeded to trial before the Court and a jury and verdict in favor of the plaintiff resulted and judgment was duly entered. That notice of motion for new trial has been served and a bond for stay of execution has been duly filed by the American Bonding Company.

Affiant further states with reference to the Flato Commission Company that said Flato Commission Company was first served by serving Chas. E. Neal as statutory agent of the Flato Commission Company, such service being made on the 17th day of May, 1904. That thereafter and on the 31st day of January, 1905, the Flato Commission Company appeared by its counsel and moved to quash the summons on the ground that said Neal was not the statutory agent of the Flato Commission Company. That immediately upon said summons being quashed an alias summons was issued and the same was afterwards served upon the Flato Commission Company upon the —— day of February, 1905, by serving the auditor of Ada County, Idaho, as provided by the statutes of Idaho. That said Flato Commission Company has never made any appearance by demurrer or answer but has defaulted and that default was fully taken against the said Flato Commission Company in the said court upon the 6th day of March, 1905, and

judgment duly entered upon said default the 7th day of March, 1905. And further affiant saith not.

W. E. BORAH.

Subscribed and sworn to before me this 13th day of March, 1905.

[Seal] JOHN J. BLAKE,
Notary Public.

[Endorsed]: Affidavit of W. E. Borah. Filed March 13, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Certificate of District Judge.

State of Idaho,
County of Ada,—ss.

I, George H. Stewart, Judge of the District Court of the Third Judicial District of the State of Idaho in and for Ada County, do hereby certify that the answer in the above-entitled cause was filed by the defendant, the American Bonding Company, on December 12, 1904, prior to which time said company had appeared by its attorneys and argued a demurrer which was overruled. That upon the 25th day of January, 1905, in open court, plaintiff and defendant, the American Bonding Company, being present by their attorneys said cause was called for setting and was set for trial by consent of both parties for February 4, 1905, and that no objection or protest was made at said time as to the jurisdiction of the Court or against proceeding to trial in

the State court. That prior to the time the present petition for removal was filed, the defendant, the American Bonding Company, had appeared by counsel and had consented that the cause be set for trial and had itself called for a jury trial in said case.

GEORGE H. STEWART,
District Judge.

[Endorsed]: Certificate of District Judge. Filed March 13th, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Motion to Remand.

Comes now the plaintiff above named and moves that the above cause be remanded to the District Court of the Third Judicial District of the State of Idaho in and for Ada County, and for grounds of said motion says:

1. That it appears from the files and records in this case and from the alleged petition for removal that no ground exists for the removal of said cause from the District Court of the Third Judicial District of the State of Idaho in and for Ada County to the above court.

2. It appears from the alleged petition for removal and the petition and files and affidavits in this case that this Court has no jurisdiction of the above cause and that said suit was improperly removed to this court.

3. That it appears that all the defendants did not join in the petition for removal as required by the Stat-

utes and laws relative to the removal of causes from the State Court to the Federal Court.

4. That this court has no jurisdiction of this cause.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Motion to Remand. Filed March 13, 1905. A. L. Richardson, Clerk.

(Caption and Title Omitted.)

Affidavit of B. F. Neal.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being first duly sworn, deposes and says that he is one of counsel for the American Bonding Company, one of the defendants in the above-entitled action. That he is the counsel who prepared and filed the various papers for removal heretofore filed in this case, and is the B. F. Neal who argued the demurrer filed by said defendant to the complaint herein on Sept. 22, 1904, before the Hon. Geo. H. Stewart, Judge of the District Court in and for Ada County, Idaho.

Affiant further says that on the date of the argument of said demurrer this affiant orally objected to the jurisdiction of said court to hear said demurrer for the reason that there was in the files pleas to the jurisdiction of the Court over the Flato Commission Company and unacted upon, which said pleas were founded upon the alleged ground that no service of summons as required

by law had been had upon said defendant, and that the purported service was void and wholly unauthorized. That this defendant at such time and place and prior to the beginning of the argument on said demurrer objected to being required to argue said demurrer for the reason that if the Flato Commission Company was not a party to the suit brought in by due and proper service of summons that it was an election to proceed against the American Bonding Company only to require at that time arguments and rulings upon said demurrer, and that said cause was lawfully removed to the Circuit Court of the United States, District of Idaho, as to American Bonding Company. That notwithstanding affiant's said objections on behalf of American Bonding Company the Court required that they proceed and thereafter did rule upon said demurrer, overruling the same.

Affiant further says that thereafter in due and proper time the American Bonding Company filed its answer in said cause and that on the first day of January, A. D. 1905, term of the District Court in and for the Third Judicial District, State of Idaho, for Ada County, upon the calling of the docket this cause was set for hearing being No. in regular order of the jury cases for trial.

Affiant further says that at said time, nor any other time, did this affiant demand a jury. He further states that he did decline to waive a jury on behalf of the American Bonding Company.

Affiant further says that said causes were not at the opening of said court set for any date certain, but were

set for trial in their order as the civil jury cases appeared upon the civil trial docket and that they were on said docket cases Nos. 25 and 26 and were civil jury cases Nos. ——— and ———.

Affiant further says that on February 1st thereafter and before the trial of any of the civil jury cases the case of William Finney vs. American Bonding Company was set for trial to follow the Fred Bond and Jennie Daly murder cases, which date was supposed to be about Feb. 4, 1905. That said date was set without the consent of affiant or his co-counsel who represented the defendant, the American Bonding Company. That on said February 4th an application to quash service of summons which had been theretofore filed by the Flato Commission Company was sustained and then and thereby defendant, the American Bonding Company, became and was the only party defendants to said action. That affiant acting for said American Bonding Company then and there in open court immediately after the discharge of the said Flato Commission Company as a party defendant renewed its former application to have said case removed to the United States Circuit Court for the District of Idaho, as will more fully appear by the transcript filed herewith.

Affiant further says that the Hon. George H. Stewart declined to permit the papers to be removed to the Federal Court but stated that defendant, the American Bonding Company, might take a transcript of the papers and have the matter heard before Beatty. That thereafter by agreement between counsel for plaintiff and

affiant said cause was heard on the original papers in the Federal Court before the Hon. James H. Beatty, and that said cause was remanded by said court, for the reason that the record then before the said Court showed that there was a summons outstanding against the defendant, the Flato Commission Company, and that it had been duly served by serving upon W. L. Cuddy, Auditor of Ada County, Idaho, as by statute provided, and said Flato Commission Company was not a party to said removal petition, and for these reasons said Beatty caused said action to be remanded to the State Court as not removable.

Affiant further states that on the morning of February 9th, at the hour of opening court affiant was present in court when the Court announced that he would set the Finney and Mills cases against the American Bonding Company, said cases being the actions at bar, to follow the Jennie Daly case, and such entry was duly made of record in the journals of said court. That at said time in open court this affiant orally objected to the jurisdiction of said court to try this cause as to defendant, the American Bonding Company, at a date prior to the time when the defendant, the Flato Commission Company, would be compelled to answer or plead to the petitioner herein, and for the further reason that as to defendant, the American Bonding Company, said cause had been lawfully removed to the Federal Court.

Affiant further states that he relied upon the state-

ment of the said Court then and there made that if tried this case would not be tried until after the trial of the State of Idaho vs. Jennie Daly.

Affiant further says that he was notified by telephone on the night of February 15th at about eight o'clock P. M. that the case of Mills against the American Bonding Company et al. would be set for 10 o'clock February 16th, and the case of Finney vs. American Bonding Company et al., would immediately follow that. Affiant further says that immediately upon the opening of court on the morning of February 16, 1905, he made his objections, which he then and there asked the reporter to take down in writing and which are filed herewith, objecting to the jurisdiction of said court to try either the Mills or Finney case at said time or at all, for the reason that said cause was not at issue as to the Flato Commission Company; for the reason that said cause had been lawfully removed as to the American Bonding Company, and for other reasons set out in said objections as shown by the reporter's transcript herewith.

Affiant further says that at every stage of the trial of each of the above cases in the said Court this affiant and his co-counsel objected to the jurisdiction of the said Court to try these cases for the reason that they had been removed; for the reason that cause was not at issue as to the defendant, Flato Commission Company; for the reason that cause was taken up out of its order for trial and without proper notice to counsel for de-

fendant, and for other reasons which are set out more specifically in the reporter's transcript of said evidence.

Further affiant saith not.

B. F. NEAL.

Subscribed and sworn to before me this 18th day of March, 1905.

[Seal] L. V. HOUSEL,
Notary Public.

March 22d, 1905.

Service of within affidavit by copy admitted without waiver of any rights.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Affidavit of B. F. Neal. Filed March 22d, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Proceedings Before District Court.

Be it remembered that on the 17th day of February, 1905, on the trial of the above-entitled cause before the Hon. Geo. H. Stewart, Judge of the Third Judicial District of the State of Idaho, with a jury, the following proceedings were had and entered of record, to wit:

Before the impaneling of the jury the following objection was made by the defendant:

Mr. NEAL.—The defendant, the American Bonding Co., objects to going to trial at this time for the reason that the Flato Commission Co. is the principal defend-

ant in this action, the American Bonding Co. being mere surety, and that this action is not at issue as to the defendant, the Flato Commission Co.

The defendant, the American Bonding Co., objects to going to trial at this time, for the further reason that this cause was on the 16th day of February, 1905, lawfully removed to the Federal Court for the District of Idaho by both the defendants herein, and this Court has no jurisdiction to try the same.

The COURT.—This case was set for February. Did you have your witnesses here at that time?

Mr. NEAL.—No, sir.

The COURT.—Did you ever have them here?

Mr. NEAL.—No, sir; they have been constantly under call so we could get them on telegraphic call.

The COURT.—The motion is overruled.

To which action and ruling of the Court, defendant, the American Bonding Co., by counsel, then and there duly excepted.

State of Idaho,
County of Ada,—ss.

W. L. Phelps, being first duly sworn, deposes and says: That he is the official stenographer of the Third Judicial District of the State of Idaho; that he took the trial of the above-entitled cause in shorthand, making an accurate report of same, and that the above is a true and correct copy of said proceedings in relation to the things therein stated. W. L. PHELPS.

Subscribed and sworn to before me this 22d day of March, 1905.

[Seal]

W. L. CUDDY,
Clerk.
By Otto F. Peterson,
Deputy Clerk.

March 22d, 1905.

Service of within affidavit by copy admitted without waiver of any rights.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Proceedings Before District Court. Filed March 22d, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Supplemental Petition for Removal.

Comes the American Bonding Company, petitioner herein, and for its additional and supplemental petition for removal herein, adopts, reaffirms and reiterates, each and every statement of its petition for removal filed in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on the 16th day of February, 1906, and in this court on the 13th day of March, 1905, as well as also all proceedings therein referred to and made a part thereof, and for its supplemental petition herein further says:

I.

That after the due filing of its petition and bond for

removal on said 16th day of February, 1905, and after the due filing of the petition and bond for removal filed herein by the Flato Commission Company, the codefendant herein with this petitioner, and the due calling of the attention of the said Court, which was then and there in session, to said petitions and bonds, and the request on the part of each of said defendants that said District Court, in and for said Ada County, enter its order, that it proceed no further and that it enter its order that this petitioner and its codefendant, the said Flato Commission Company, had lawfully removed said cause to the Circuit Court of the United States for the District of Idaho, the said Court did then and there refuse to enter said order or any part thereof, and did notwithstanding said proceedings so as aforesaid taken by petitioner and its codefendant, the Flato Commission Company, order that said cause proceed to immediate trial as to this petitioner only, whereupon this petitioner filed its objections thereto, on the ground that said cause had been on that date lawfully removed to this court, and further objected and protested against said Court taking any proceedings whatever therein and demanded that said cause be continued until such time as its codefendant, the said Flato Commission Company, was by law required to plead and answer. That notwithstanding said objections and protests of this petitioner, said Court at the request of plaintiff in this cause, did proceed to impanel a jury and try this cause, notwithstanding the same was not at issue as to its codefendant, the Flato Commission Company, and notwithstanding the said Flato Commission Company had not answered or

pleaded to said complaint, and notwithstanding the time in which said Flato Commission Company was required by law to answer or plead had not expired, and did so try the same on the 17th day of February, 1905, over the said protest and objections of your petitioner as aforesaid, made and caused to be duly entered of record, and did submit said cause to said jury as aforesaid against the said protests and objections of this petitioner so as aforesaid made and caused to be entered of record and caused said action to be tried and verdict found as to this defendant only; that then and thereby by the acts of the said plaintiff, done as aforesaid over the protests and objections of this petitioner so as aforesaid made and entered, and with full knowledge of the fact that as to the Flato Commission Company, defendant herein as aforesaid, the time to answer or plead had not expired, the said plaintiff elected to proceed against this defendant separately, and then and thereby there was by the act of said plaintiff a severance of said cause of action as to the said defendants, and each of them, and then and thereby for the first time, this petitioner had a separate right of removal from the right of its co-defendant herein; and said cause was for the first time removable as to this petitioner, without the joint and concurrent action of its codefendant herein, which facts more fully appear by the records filed herein, as well as by the affidavits in support of petitioner filed by this petitioner herein.

Wherefore, petitioner prays that this Court take jurisdiction of this cause and issue its order to the District Court of the Third Judicial District of the State of

Idaho, in and for Ada County, that it proceed no further herein, and that all proceedings in said court be stayed as of this date until further order of this Court.

NEAL & KINYON, and
MORRISON & PENCE,
Attorneys for Petitioner.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being first duly sworn, deposes and says that he is one of the attorneys for petitioner in the above-entitled action; that he had read the above and foregoing supplemental petition for removal and knows the contents thereof; that the facts stated therein are true of his own knowledge, except as to matters therein stated to be on information and belief, and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that petitioner is a corporation and is absent from the county where the attorney resides and where the suit is filed.

B. F. NEAL.

Subscribed and sworn to before me this 23d day of March, 1905.

[Seal] L. V. HOUSEL,
Notary Public.

[Endorsed]: Supplemental Petition for Removal. Filed March 23d, 1905. A. L. Richardson, Clerk.

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Tuesday, the 4th day of April, 1905. Present: Hon. JAS. H. BEATTY, Judge.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Plaintiff,
vs.
AMERICAN BONDING COMPANY OF BALTIMORE et al.,
Defendants.
No. 250.

Order Denying Motion to Remand.

On this day was announced the decision of the Court upon the motion to remand this cause, heretofore argued and submitted, to the effect that said motion be denied. To which ruling plaintiff by his counsel excepted.

(Title and Caption Omitted.)

Demurrer of Defendant American Bonding Company.

Comes now the defendant, the American Bonding Company, and demurs to the complaint filed herein, and for cause of demurrer says:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Defendant, American Bonding Company.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Defendant.

Due service of the foregoing demurrer with copy admitted this 5th day of April, 1905, without waiver of right to file.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Demurrer of Defendant American Bonding Co. Filed April 5th, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Demurrer of Defendant Flato Commission Company.

Comes now the defendant, the Flato Commission Company, and demurs to the complaint filed herein, and for cause of demurrer says:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

NEAL & KINYON,
MORRISON & PENCE
Attorneys for Defendant Flato Commission Company.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

NEAL & KINYON,
MORRISON & PENCE
Attorneys for Defendants.

Due service of the foregoing demurrer with copy admitted this 5th day of April, 1905, without waiver of right to file demurrer.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Demurrer of Defendant Flato Commission Co. Filed April 5th, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Order Extending Time to File Bill of Exceptions.

It is hereby ordered and adjudged that the plaintiff in the above-entitled cause have sixty days after the trial of the above cause in which to prepare and file his bill of exceptions in the above-entitled cause, and it is further ordered that an exception is hereby allowed to

plaintiff in overruling the plaintiff's motion to remand the above cause to the State Court.

JAS. H. BEATTY,

[Endorsed]: Order extending Time, etc. Filed April 5th, 1905. A. L. Richardson, Clerk.

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Saturday, the 8th day of April, 1905. Present: Hon. JAS. H. BEATTY, Judge.

WILLIAM FINNEY, Late Sheriff, etc., Plaintiff,
vs.
AMERICAN BONDING COMPANY OF BALTIMORE et al., Defendant.
No. 250.

Order Overruling Demurrers.

On this day was announced the decision of the Court upon the separate demurrers of the defendants, the American Bonding Company of Baltimore and the Flato Commission Company, heretofore argued and submitted, ordered that said demurrers each be and the same is hereby overruled, and that the Flato Commission Company be given until the 15th inst. to answer in said cause. An exception to the ruling on the demurrers is allowed.

(Title and Caption Omitted.)

Answer of Defendant Flato Commission Company.

Comes defendant, the Flato Commission Company, and for its separate answer herein admits, alleges and denies as follows:

I.

Admits the allegations of paragraphs one and two of said complaint.

II.

Answering paragraph three of plaintiff's complaint herein, this defendant admits that it did file with plaintiff as sheriff of Blaine County, Idaho, an affidavit and notice in due form of law, and as required by the statutes of the State of Idaho, relative to the foreclosure of chattel mortgages under the process of "notice and sale; admits the execution of a bond of which the copy annexed to said complaint is a substantial copy. Further answering said paragraph this defendant says that it has not information or belief sufficient to enable it to answer the other allegations of said paragraph three, to wit, that under and by virtue of the aforesaid affidavit and notice delivered to said plaintiff as aforesaid by this defendant, plaintiff took possession of certain personal property, to wit: 5,469 head of sheep, or any other number of sheep branded as in said paragraph set out, or that all or any of said sheep were claimed by Ralph Cowden, or by any other person as his separate and individual property, and therefore denies each and all of said allegations. And further alleges that if any sheep

were taken by plaintiff by virtue of said writ, then they were the property of A. L. Shaw, and were the property described in the chattel mortgage referred to in said complaint as having been given by said R. L. Shaw to this answering defendant, which said mortgage was given for value and without any design to hinder, delay or defraud creditor or creditors and were in good faith so executed by said Shaw.

III.

Answering paragraph four of plaintiff's complaint herein, this defendant admits the signing of the alleged bond herein mentioned, and further answering denies that said bond was made, executed and delivered for the purposes in said paragraph set out, to wit, in order that plaintiff might hold said sheep, retain possession of the same and make sale thereof, to satisfy the mortgage of this defendant. Further answering said paragraph four this defendant alleges the facts as to the execution of said bond to be as follows: That when said affidavit and notice mentioned as aforesaid by plaintiff were delivered to plaintiff by this defendant for service in the manner provided by law, to wit, by levy, advertisement and sale, the plaintiff declined to serve the same by levying and taking into his possession the personal property therein described or do any other thing whatever by law of him required until he had first been indemnified by this defendant with an indemnity bond for the amount of and conditioned as in said paragraph four set out. That thereafter this defendant in order that he might have and receive at the hands of said

plaintiff, sheriff as aforesaid, the service and duty by him owing in the premises to this defendant, did on said sheriff's demand and refusal to act unless and until so indemnified, procure to be executed and delivered to the plaintiff as sheriff aforesaid, a bond of indemnity, conditioned in manner and form as aforesaid, required by said plaintiff; that is to say in said paragraph four set out. That said bond of indemnity was not voluntary but was coerced and extorted from said Flato Commission Company without authority of law and in violation of law, and was so executed solely in order that said Flato Commission Company might require and have at the hands of plaintiff, as sheriff aforesaid, service and duty which he by law was required to render to this defendant upon the payment or tender of his lawful fees therefore, which fees were then and there tendered and paid, and said Flato Commission Company was entitled to said service without any other or further requirement or demand whatsoever on the part of said plaintiff, sheriff as aforesaid. That said bond was taken by said plaintiff as sheriff aforesaid under color of his office as sheriff as aforesaid, and is wholly unauthorized by law and is wholly without consideration and is illegal and void, wherefore, this defendant ought not to be charged and holden on the same.

IV.

Answering paragraph five of plaintiff's complaint herein, defendant denies that upon the execution and delivery of said bond of indemnity the plaintiff retained possession of any sheep and denies that he had any

sheep in his possession when said bond was executed and delivered, and denies that he sold any sheep other than the sheep mortgaged, and which were described in the mortgage and the process, placed in his hands in said foreclosure proceedings at the request of this defendant, or at all, and denies that this defendant, or any person in its behalf, requested the sale of any sheep other than those mortgaged and described in said mortgage and process, or made any request or gave any notice other than that contained in said process and further answering alleges the facts with reference to the surroundings and giving of said bond are as set forth in paragraph three of this answer.

V.

Answering paragraph six of plaintiff's complaint herein, this defendant says that it has not sufficient information or belief to enable it to answer the paragraph six, to wit, that one Ralph Cowden had commenced an action against plaintiff as sheriff of Blaine County, Idaho, and had recovered judgment in the District Court of the Third Judicial District in and for Canyon County, State of Idaho, for the sum of $8,789.24 and for costs amounting to $250.00 and wherein it was ordered and adjudged that said Cowden have a return of the property described in said affidavit and notice, and so as alleged, claimed by said Cowden, or in lieu thereof his damage in the sum of $8,798.24 and costs in the sum of $250.00, nor of any other judgment for return of property or damages, or costs in any said matters, nor of

the affirmance of said judgment, or any judgment in the premises on appeal in the Supreme Court of Idaho. Nor of the fact of plaintiff herein being liable to Ralph Cowden in the sums as in said paragraph six alleged, or of any other sum or sums of money by reason of said alleged judgment, nor there being any judgment as alleged by plaintiff growing out of the matters alleged in said complaint and for this reason denies the same.

Further answering said paragraph six this defendant denies that plaintiff herein appeared in any such alleged suit and contested the same at the instance or at the request, or with the full knowledge, or any knowledge, or with notice to, or with the consent of, or by the advice of this answering defendant.

VI.

Answering paragraph seven of the plaintiff's complaint herein this defendant denies that the conditions of said alleged indemnity bond have been broken, denies that this defendant is liable to the plaintiff because of the execution of said alleged bond, and by virtue of the terms and conditions of the same in the sum of $8,798.24, principal and interest, and the further sum of $250.00 costs with interest on said amounts as in said paragraph seven alleged, or in any other sum or sums.

VII.

Answering the allegations of paragraph one of the second cause of action of plaintiff's complaint, which said paragraph adopts the allegations of paragraphs one, two, three, four, five, six, and seven of the first

cause of action of the complaint herein as a part of said second cause of action, this defendant adopts his answer to the aforesaid seven paragraphs comprising the first cause of action set forth in the complaint herein as fully as though they were fully in this paragraph repeated and set forth.

VIII.

Answering the allegations of paragraph two of the second cause of action set forth in the complaint herein, this defendant says that it has not information or belief sufficient to enable it to answer the allegations of said paragraph two, to wit, that plaintiff in contesting said alleged action referred to in the first cause of action set forth in said complaint has paid out, contracted for, and become liable for, costs and expenses in traveling and attorney's fees in the total sum of $542.90 as in said paragraph two set out, or any part thereof, and therefore denies the same.

Second Defense.

For a second and further defense this defendant says that it adopts the allegations of paragraphs one, two, three, four, five, six, seven and eight of its answer herein, as fully as though herein fully set out, and says that under said facts the bond sued on in this action is without valid consideration was coerced and extorted from this defendant, and was so taken and required without authority of law, and contrary to both the statutes and the policy of the law, and plaintiff is not entitled to recover thereon against this defendant.

Third Defense.

For a third and further defense this defendant says that the complaint herein does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

Wherefore, this answering defendant asks that this action be dismissed as against it and that it recover its costs herein, expended.

MORRISON & PENCE,
NEAL & KINYON,
Attorneys for Flato Commission Company, Sonna Block, Boise, Idaho.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being first duly sworn, deposes and says that he is one of the attorneys in the above-entitled action for defendant, the Flato Commission Company, that he has read the foregoing answer, knows the contents thereof, and that the facts therein stated are true of his own knowledge, except as to the matters therein stated to be on information and belief, and to those matters he believes them to be true. That affiant makes this affidavit for the reason that defendant, the Flato Commission Company, is a corporation and absent from the county where the attorney resides, and where the suit is filed.

B. F. NEAL.

Subscribed and sworn to before me this 15th day of April, 1905.

[Seal] L. V. HOUSEL,
Notary Public.

Due service of the foregoing answer with copy admitted this 15th day of April, 1905.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Answer of Flato Commission Company. Filed April 15th, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Notice to Produce Papers.

To the Above-named Defendant and Their Attorneys of Record, Morrison & Pence, and Neal & Kinyon.

You will please have and produce at the trial of the above cause to be used as evidence therein by the plaintiff, all letters written from the Boise office of the American Bonding Company, to the eastern offices, either at Denver, Colorado, or Baltimore, Maryland, relating to the suit of Ralph Cowden vs. William Finney, sheriff of Blaine County, and all letters and copies of letters sent out from the Boise office of the above-named bonding company to the said eastern offices relative to the commencement of the trial of said suit or to the giving of the indemnity bond in the matter of the foreclosure proceedings of the chattel mortgage of the Flato Commission Company, the particular dates of said letters the plaintiff cannot give.

If said letters are not produced, secondary evidence of the same will be introduced by the plaintiff.

W. E. BORAH,
Attorney for Plaintiff.

Service of copy admitted this 28th day of April, 1905.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Defendants.

[Endorsed]: Notice to Produce Papers. Filed April 28, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Stipulation Waiving Jury.

It is hereby expressly stipulated and agreed in open court by and between counsel for plaintiff and defendants that a jury in the above-entitled cause is waived, and it is agreed that said cause shall be tried by the Court without a jury.

W. E. BORAH,
Attorney for Plaintiff.
MORRISON & PENCE, and
NEAL & KINYON,
Attorneys for Defendants.

[Endorsed]: Stipulation Waiving Jury. Filed May 1st, 1905. A. L. Richardson, Clerk.

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Monday, the 1st day of May, 1905. Present: Hon. JAS. H. BEATTY, Judge.

WILLIAM FINNEY, Sheriff,
vs.
AMERICAN BONDING CO. et al., } No. 250.

Order Waiving Jury.

Now came the parties by their respective counsel and thereupon a jury was waived in open court in accordance with stipulation on file, and it was ordered that said cause be set for trial before the Court not prior to the 20th inst.

———

(Title and Caption Omitted.)

Notice to Take Deposition of Ed. H. Reid.

To William Finney, Plaintiff, and W. E. Borah, his Attorney:

The above-named plaintiff will take notice that on Monday, the 24th day of April, 1905, the said defendants, and each of them, will take the deposition of Ed. H. Reid, witness, to be used as evidence on the trial of the above-entitled cause, at the law offices of Peete & Abrahams, No. 211 Continental Building (corner 17th and Lawrence streets), in the City of Denver, county of Arapahoe and State of Colorado, between the hours of

9 A. M. and 6 P. M. of said day, and the taking of said depositions will be adjourned from day to day (not including Sundays and legal holidays), between the same hours until they are completed.

MORRISON & PENCE,
NEAL & KINYON,
Attorneys for Defendants.

Received copy of the above notice this 15th day of April, 1905, and consent is hereby given that said depositions may be taken at the time and place in said notice specified; subject to all objections for competency, relevancy and materiality.

W. E. BORAH,
Attorney for Plaintiff.

State of Colorado,
City and County of Denver
(Formerly Arapahoe County),—ss.

Deposition of Ed. H. Reid.

The deposition of Ed. H. Reid, a witness produced and sworn before me, Lucy W. Piper, a notary public in and for the said city and county of Denver (formerly a part of Arapahoe County) on the 24th day of April, A. D. 1905, pursuant to the attached notice. This deposition taken on the part of defendant, the American Bonding Company of Baltimore, and the Flato Commission Company, in a certain action now pending in the Circuit Court of the United States for the State of Idaho, Central Divi-

(Deposition of E. H. Reid.)

sion, Ninth Circuit, wherein William Finney is plaintiff and the American Bonding Company of Baltimore and the Flato Commission Company are defendants.

The said ED. H. REID, being duly sworn, to testify the truth, the whole truth, and nothing but the truth relating to this cause, deposes as follows:

Q. State your name, place of residence and occupation.

A. Ed. H. Reid. Wyncote, Wyoming. Vice-President and general manager of the North Platte Canal and Colonization Company, the Wyoming and Nebraska Land and Cattle Company and the Rawhide Ranch Company.

Q. In what business were you engaged in July, 1902?

A. The livestock commission business.

Q. With what concern?

A. The Flato Commission Company, of South Omaha, Nebraska.

Q. What, if any, position, did you hold with these people at this time?

A. I was one of the directors of this company, I suppose you might say, their general western agent.

Q. Are you the Ed. H. Reid who signed the so-called indemnity bond given in this case, by the Flato Commission Company and by the American Bonding Company of Baltimore, as surety? A. Yes.

Q. What was the reason that the bond in question was given?

(Deposition of E. H. Reid.)

A. In the fall of 1901, about the 30th day of November, one R. L. Shaw, for and in consideration of the sum of $18,626.55 in hand to him paid by the Flato Commission Company, incorporated, did bargain, sell and convey to the said Flato Commission Company, and its successors and assigns, the following stock and chattels: to wit, about thirty-five hundred head of yearling wethers and wool; about thirty-five hundred ewes, their increase and wool; about three thousand mixed lambs and wool; also, two hundred head of native two year old steers, branded PP or TT on left hip; all the above named sheep and lambs were marked quarter circle C, made thus, $\overset{\frown}{C}$ with black paint. Value of said security was supposed to be about $36,000.00. In July, 1902, I was instructed by the Home Office to go to Salt Lake City, meet George A. Hawkes, accompany him to Boise and proceed to foreclose the said mortgage. Mr. Hawkes also representing the company, had been on the ground in that locality, and having learned from reports that said Shaw had departed for parts unknown, proceeded to locate the property. On my arrival at Boise, we employed counsel, Messrs. Hawley and Puckett, and Mr. Hawkes and myself thereupon made a statement of the facts surrounding the case to Mr. J. H. Hawley. In fact, all of my conversations and transactions with reference to these matters, and in any way relating to the foreclosure of the R. L. Shaw mortgage mentioned in the complaints in the Mills and Finney suits, were had with J. H. Hawley. Mr. Hawley advised foreclosure of the

(Deposition of E. H. Reid.)

mortgage, by the process of "Affidavit and Notice" or "Notice and Sale," provided for by the statutes of the State of Idaho in the foreclosure of chattel mortgages. Mr. Hawkes had at this time located one brand of these sheep in Blaine county, near Hailey. On the same day, July 22, 1902, Mr. Hawley, drafted statutory affidavit and also prepared a notice required by statute accompanying same, for the purpose of selling the sheep so located in Blaine county, under the process known as "Notice and Sale"; and to this end, Mr. Geo. A. Hawkes verified the affidavit in the presence of a notary in the office of Messrs. Hawley and Puckett. My recollection is, also, that Mr. Hawkes signed the notice directing the sheriff to make the levy, though of that I would not be sure; I do well recollect the fact that it was executed at the same time as the affidavit and was executed in the offices of Messrs. Hawley and Puckett, in Boise City. We being very anxious to have an immediate levy made by the sheriff of Blaine county, Mr. Hawley suggested that he should call up Sheriff Finney, who is the plaintiff in the action entitled William Finney vs. The American Bonding Company of Baltimore and the Flato Commission Company, and tell Mr. Finney that Mr. George A. Hawkes, a representative of the Flato Commission Company, would start that afternoon for Hailey and have Mr. Finney ready to go out and levy on the sheep early the following morning. While we were there, at that time, Mr. Hawley called for Sheriff Finney at

(Deposition of E. H. Reid.)

Hailey, Idaho. Perhaps half an hour later, Mr. Finney answered the call and in response to Mr. Hawley's statement to Mr. Finney that Mr. George A. Hawkes was starting that afternoon for Hailey, taking with him a duly executed statutory affidavit and notice for the purpose of foreclosing the R. L. Shaw mortgage as to one brand of sheep which had been located near that place by Mr. Hawkes, and requesting Sheriff Finney to meet Mr. Hawkes at the depot and go with him early the following morning to make a levy of the process of notice and sale upon the sheep in question, and thereafter sell the same. To this request, Mr. Finney replied that he would not make a levy of the process of notice and sale by affidavit and notice, as provided by the statutes of Idaho, unless the Flato Commission Company would first furnish him with a bond of indemnity covering the value of these sheep and damages in case it should prove they were wrongfully taken. As near as I can recollect the matter at this time, he demanded a bond of indemnity in the sum of ten thousand dollars. He stated that he would take no steps whatever, looking to a levy upon any sheep, claimed to have been mortgaged by R. L. Shaw to the Flato Commission Company, unless he was first indemnified.

Thereafter, Mr. J. H. Hawley, Mr. Hawkes and myself, went to the office of Chas. F. Neal, agent for the American Bonding Company for the State of Idaho, and I made out an application for the bond required by Sheriff Finney. The bond was thereafter drawn on the

(Deposition of E. H. Reid.)

same day and I signed it, as the representative of the Flato Commission Company, in their behalf. On the following day, Mr. Hawkes, Mr. Hawley and myself went to Caldwell, Idaho, to talk to Mr. Ralph Cowden about this matter, and later in the afternoon all returned, Mr. Hawley to Boise, Mr. Hawkes to Shoshone and thence to Hailey, and I to Salt Lake. I did not see the sheep in question during the summer of 1902.

Q. About how far do you live from Boise, Mr. Reid?

A. Well, about one thousand miles, I expect.

Q. Do you expect to be in, or move to the vicinity of Boise, any time in the near future? A. No, sir.

(S) ED. H. REID.

State of Colorado,
City and County of Denver
(formerly Arapahoe County),—ss.

I, Lucy W. Piper, a notary public in and for said county, hereby certify that the above-named Ed. H. Reid was by me first duly sworn according to law to testify the truth, the whole truth and nothing but the truth relating to said cause; that his deposition was reduced to writing by me, and said deposition was taken at the time and place in said notice specified, in the city and county of Denver, being in place identical with the former county of Arapahoe, in the State of Colorado, and was taken on the 24th day of April, A. D. 1905, between the hours of 9 A. M. and 6 P. M. of said day.

In testimony whereof, I have hereunto set my hand and notarial seal this 24th day of April, A. D. 1905.

My commission expires March 2d, 1907.

[Seal] LUCY W. PIPER,
Notary Public.

[Endorsed]: Deposition of Ed. H. Reid. Filed April 27th, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

Notice to Take Deposition of George A. Hawkes.

To William Finney and W. E. Borah, his Attorney:

The above-named plaintiff will take notice that on Thursday, the 18th day of May, 1905, the defendants and each of them will take the deposition of George W. Hawkes, a witness to be used as evidence on the trial of the above-entitled cause at the law offices of James Pardee, at the Eagle Block in the City of Salt Lake, County of Salt Lake, and State of Utah, between the hours of 9 A. M. and 6 P. M. of said day, and the taking of said deposition will be adjourned from day to day (Sundays and legal holidays excepted), between the same hours until they are completed, subject to all objections, for competency, relevancy and materiality.

MORRISON & PENCE and
NEAL & KINYON,
Attorneys for all Defendants.

Received copy of the above notice this 10th day of May, 1905, and consent is given that said deposition may be taken at the time and place in said notice specified.

W. E. BORAH,
Attorney for Plaintiff.

Deposition of George A. Hawkes.

Deposition of sundry witnesses taken before me, Leonora Trent, a notary public within and for the county of Salt Lake, State of Utah, on the 27th day of May, A. D. 1905, between the hours of 9 A. M. and 5 P. M., at room No. 6 in the Eagle Block, Salt Lake City, Salt Lake County, Utah, pursuant to the annexed notice, to be read in evidence in behalf of the defendants in an action pending in the Circuit Court of the United States in and for the District of Idaho, Central Division, Ninth Circuit, County of Ada, in which William Finney, late sheriff of Blaine county, Idaho, is plaintiff, and the American Bonding Company of Baltimore, and Flato Commission Company are defendants:

GEORGE A. HAWKES, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and said, as follows:

JAMES D. PARDEE, Esqr., attorney, appearing for the defendants, questioned the witness as follows:

Q. What is your name?

A. George A. Hawkes.

Q. Where do you reside?

(Deposition of George A. Hawkes.)

A. Salt Lake City, Utah.

Q. What is your business, your occupation?

A. Traveling freight and livestock agent for the Rio Grande Railroad Company.

Q. How long have you been such agent for the Rio Grand Railroad Company?

A. You mean since I left the Flato Commission Company? I believe it was the first day of last July, 1901, that I went to work for them.

Q. Were you ever employed by the said railroad company before that time? A. Yes, sir.

Q. When did you commence to work for them the first time, if you remember?

A. I commenced to work for them in the express department, in 1890, about the last of the year, and as traveling freight and livestock agent some time in July, 1895, continued to work for them until I resigned to take a position with the Flato Commission company either in February, 1901, or 1902, as near as I can remember.

Q. What were your duties as traveling freight agent or traveling livestock agent for the Rio Grande Railroad Company?

A. Soliciting shipments of both dead freight and livestock for that company.

Q. While working for said company as livestock agent did you gain any information as to the weight of livestock and their prices? A. I think so.

(Deposition of George A. Hawkes.)

Q. State what experience you had in getting information as to weights and prices of livestock?

A. No particular experience other than from parties making shipments of livestock east I have seen a number of shipments weighed before being loaded for the market, and also seeing accounts of sales after the parties returned, which gave me a pretty good idea of the weights of certain classes of sheep on the range.

Q. State how good your judgment got to be in judging of the weight of the sheep or livestock, gained through your experience with handling sheep?

A. At the time I thought my judgment very fair.

Q. When did you commence working for the Flato Commission Company?

A. In February, 1901, or 1902.

Q. What were your duties in connection with the Flato Commission Company?

A. Soliciting shipments for their commission house and looking after their business in general in Utah, Wyoming, Idaho and Nevada.

Q. How long did you work for the Flato Commission Company?

A. About two and one-half years, as nearly as I can remember.

Q. During the summer of 1902, what was your knowledge as to the prices of sheep and livestock, if you had any?

A. Only from the market reports given by the different stock yards papers at Missouri River Points and

(Deposition of George A. Hawkes.)

Chicago, which reports I received nearly every day when I was at railroad points where I could receive my mail.

Q. What papers do you remember of reading?

A. The "Daily Drovers' Journal" and "Stockman," published at Omaha, a paper called "The Telegram," published in Kansas City; also a livestock paper published in Chicago, at the present time I don't remember its name, also a livestock paper published in Denver, besides some market reports sent out by nearly all commission houses to livestock growers throughout the country quoting markets during the shipping season, and also livestock markets published in a great many of our Western papers, such as "The Salt Lake Tribune" and the "Salt Lake Herald."

Q. During the summer of 1902, were you familiar with the local livestock market of Idaho?

A. Yes, sir.

Q. During the summer of 1902, what was the difference between the local market values of Hailey, Idaho, and the eastern markets?

A. I think the difference between the two markets was the cost and expense of transportation between those points plus the shrinkage on the stock.

Q. Were the markets of Idaho, and particularly near Hailey, Idaho, during the summer of 1902, practically controlled by the eastern market prices?

A. I think they were.

Q. Did you know ex-sheriff, William Finney, of Blaine County, Idaho? A. Yes, sir.

(Deposition of George A. Hawkes.)

Q. Do you know Mr. R. L. Shaw?

A. I have met Mr. Shaw but am not intimately acquainted with him.

Q. At the time you were working for the Flato Commission Company you had some business with Mr. Shaw and Ex-Sheriff Finney in relation to a chattel mortgage upon some sheep, presumably belonging to Mr. Shaw, state what you did in connection with that mortgage at that time?

A. In regard to this mortgage given by Mr. Shaw, as near as I can remember at the present time, Mr. Ed. H. Reid, a representative of the Flato Commission Company, and myself, went to Boise with a view of foreclosing on the sheep mortgaged by R. L. Shaw; Mr. Reid at that time making all arrangements through his attorney there for this foreclosure proceeding, making the affidavit and giving notice requesting Mr. Finney to go and take possession of the sheep of Mr. Shaw, or in his possession, and sell them under the chattel mortgage. The sheep were branded with a quarter circle and G in black paint on the sheep's back. As I remember it, the papers in this foreclosure, to be delivered to the Sheriff Finney, were given to me by the Flato Commission Company's attorney at Boise. I took them to Hailey and delivered them in person to Sheriff Finney and went with him in search of the sheep described in the mortgage. We found the sheep about 25 miles west of Hailey in the possession of a man by the name of

(Deposition of George A. Hawkes.)

Newton Parks and Sheriff Finney posted his notices and we returned to Hailey.

Q. After that, then what did you do in regard to the sheep?

A. At the time of the notice of sale I went with Sheriff Finney to the point where the sheep were to be sold by him and bid on the sheep at the time that he was selling them at auction. As I remember it now, there were several different parties from Hailey at the sale, but only one besides myself bidding on the sheep. As near as I can remember, this other party bid $2.27 and I raised the bid to $2.27½. At this time the party that I was bidding against made objection to the sheriff accepting bids of a half a cent, and was told by Mr. Finney that it was his business to accept any raise in the previous bid, no matter how small, after which the sheep were struck off to me. We then took them to the near-by corral, ran them through a chute and counting them out as near as I can remember now something over 2,630 head.

Q. How did that price of $2.27½ per head compare with the prices of similar sheep at the "River" markets at that time?

A. I think about the same with the exception of adding thereto the cost of shipping.

Q. For whom did you bid the sheep in at that price?

A. For the Flato Commission Company of South Omaha.

Q. And what did they do with the sheep?

(Deposition of George A. Hawkes.)

A. They sent a man from Omaha to receive them after loading by myself and were shipped to Omaha.

GEORGE A. HAWKES,

Witness.

I, Leonora Trent, notary public in and for the County of Salt Lake, State of Utah, do hereby certify that George A. Hawkes was by me duly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by myself (not being interested in the suit), in the presence of the witness and was subscribed by said witness in my presence, and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit, and that said deposition was commenced at the time specified in said notice and continued without adjournment on said day.

In witness whereof I have hereunto set my hand and seal this twenty-seventh day of May, A. D. 1905.

[Seal] LEONORA TRENT,

Notary Public, in and for Salt Lake County, State of Utah.

My commission expires November 22, 1905.

[Endorsed]: Deposition of Geo. W. Hawkes. Filed June 2d, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

United States of America,
State of Nebraska,
County of Hall,—ss.

Depositions of O. W. Eaton and John R. Bonson.

Be it remembered that on this 26th day of April, A. D. (in the year of our Lord), one thousand nine hundred and five (1905), I, O. A. Abbott, a notary public, duly commissioned and qualified for and residing in the County and State aforesaid, at the office of Abbott & Abbott, in the city of Grant Island, in the County of Hall and State of Nebraska aforesaid, between the hours of nine (9) o'clock A. M. and six o'clock P. M. of said date, in pursuance of the notice and agreement hereunto attached, did call and cause to be and appear before me at said office at the time and place in said notice specified, the following named persons, to wit:

O. W. EATON and JOHN R. BONSON, sundry witnesses in behalf of the above-named defendants to testify and the truth to say on the part and behalf of the defendants above named in a certain suit and matter in controversy now pending and undetermined in the Circuit Court of the United States, Ninth Circuit, for the District of Idaho, Central Division, wherein William Finney, late Sheriff of Blaine County, Idaho, is plaintiff and the American Bonding Company of Baltimore and Flato Commission Company are defendants, and the said O. W. Eaton, being about the age of 60

years, and having been by me first duly cautioned and solemnly sworn to testify to the truth, the whole truth and nothing but the truth in the matter and controversy aforesaid, I did carefully examine the said O. W. Eaton and he did thereupon depose, testify, and say as follows, to wit:

Neal & Kinyon appearing on behalf of defendants. No counsel appearing on behalf of plaintiff.

O. W. EATON.

(Examination on behalf of Mr. B. F. NEAL.)

Q. State your name and place of residence.

A. O. W. Eaton; Wood river, Nebraska.

Q. How long have you resided at your present home?

A. About 15 years.

Q. Were you in the State of Idaho and in the vicinity of Caldwell in the State of Idaho during the year 1902?

A. Yes, sir; I think we arrived there, myself, and Mr. J. R. Bonson, about the 8th of June. I remained there in that locality and I think I left there somewhere between the 12th and 15th, not later than that, after being up in the neighborhood of Caldwell and Weiser.

Q. Are you acquainted with one W. L. Shaw?

A. Yes, sir.

Q. How long have you been acquainted with him?

A. He fed at my place either four or five years before 1902 and was there five or six months.

Q. Are you acquainted with one J. B. Gowen?

(Deposition of O. W. Eaton.)

A. I never met Mr. Gowen until that time that we were at Caldwell in the summer of 1902.

Q. Are you acquainted with one Ralph Cowden?

A. Yes, sir. I met him in the summer of 1902 at Caldwell, Idaho.

And it being about the hour of 12 o'clock noon, and the notary being necessarily engaged in other business during the rest of the day, the further taking of these depositions is continued until to-morrow, Thursday, April 27th, A. D. 1905, at the hour of nine (9) o'clock A. M. at the same place.

Office of Abbott & Abbott,
City of Grand Island,
County of Hall, and State of Nebraska.

B. F. Neal, attorney for defendant, and the witnesses, O. W. Eaton and John R. Bonson, being present, the taking of the depositions is proceeded with pursuant to the adjournment as aforesaid.

On request of counsel for defendants, the witness O. W. Eaton is withdrawn and the examination of the witness John R. Bonson commenced, the further examination of the witness, O. W. Eaton being shown herein hereafter.

I, O. A. Abbott, the notary within and for the aforesaid county and State, and at the aforesaid time and place in the aforesaid controversy, do certify that the said John R. Bonson, being of about the age of 31 years, and having been by me first duly cautioned and solemnly

(Deposition of John R. Bonson.)

sworn to testify to the truth, the whole truth and nothinb but the truth in the matter in controversy examine the said John R. Bonson, and that he did thereupon depose, testify and say as follows, to wit:

JOHN R. BONSON.

(Examination by Mr. B. F. NEAL.)

Q. State your name, occupation and place of residence.

A. John R. Bonson; I live at Scotia, Nebraska, and am engaged in ranching, farming and cattle feeding.

Q. How long have you lived at Scotia, Nebraska?

A. About one year.

Q. Where did you reside prior to that time?

A. In Grand Island, Nebraska.

Q. In what business have you been engaged in in the last 10 or 12 years?

A. Buying and selling stock, feeding and farming some.

Q. What class of stock have you been engaged in buying and selling?

A. Cattle, sheep and hogs.

Q. Were you familiar with the sheep business, with the handling of sheep, buying and selling of sheep, quality and grades and prices in the year 1902 and prior thereto?

A. Yes, sir; I aimed to keep posted on the market as close as possible.

Q. Are you acquainted with one J. B. Gowen?

(Deposition of John R. Bonson.)

A. Yes, sir.

Q. Where did you become acquainted with him?

A. At Grand Island about 10 or 12 years ago.

Q. Where did he live in the year 1902, if you know?

A. Caldwell, Idaho.

Q. Are you acquainted with one R. L. Shaw?

A. Yes, sir.

Q. Where did you get acquainted with him?

A. At Grand Island, about seven years ago.

Q. Where did he live in the year 1902?

A. I understood his family lived somewhere in Portland, Oregon, but he spent a great deal of his time in Idaho, where he had sheep interests.

Q. Was he at that time or had he been interested in business with your father, Nick Bonson?

A. They had a good many transactions but as to their being in partnership I don't think they had been.

Q. Did you have any correspondence with Gowen during the year 1902, or did you see any correspondence from him with reference to his having any sheep for sale?

A. I seen a letter that he had written to Nick Bonson offering quite a large bunch of sheep for sale *of* that they would offer them for sale a little later in the Thirty-six—Federal Transcript
season, this being sometime during the month of May, 1902.

Q. Do you know where the letter is?

A. I destroyed it, it was burned up or destroyed.

(Deposition of John R. Bonson.)

Q. What sort of sheep did he say in the letter that he had for sale?

A. He represented several bands of wethers known as the Shaw and Gowen wethers and several bands of ewes and lambs that he spoke of as the Cowden and Gowen sheep.

Q. Did he price them to you at that time?

A. No, sir.

Q. What did you do, if anything, with reference to this letter in the matter of these sheep being for sale?

A. Well, I wrote O. W. Eaton of Wood river, Nebraska, asking him if he would care to take a trip out there to Idaho with a view of looking at these sheep or what other bands we might find for sale.

Q. What further was done then than the writing?

A. About the 5th of June we went out there and stopped at Caldwell, Idaho.

Q. Yourself and O. W. Eaton? A. Yes, sir.

Q. Where did you board and room while in Caldwell, Idaho?

A. When we first got there we stopped for a day or two at the depot hotel.

Q. And where after that time?

A. After that we took our meals at different places and slept at Gowan's house.

Q. During the time that you were stopping at Gowan's house, which as I understand you, was a day or two after you got there, did you have any conversation with Gowan with reference to the Shaw sheep?

(Deposition of John R. Bonson.)

A. Yes, sir; we did.

Q. Just tell me what he said?

A. He claimed that he had charge of both the Shaw wethers and the Shaw and Gowan wethers and also had charge of the Cowden and Gowan ewes and lambs, that the wethers was ranging over near Hailey, Idaho, and that the ewes and lambs were out near Council.

Q. Did you talk to him at this time about buying these sheep or any portion of them?

A. I told him I might buy the wethers if the price was right.

Q. What did he say about it?

A. He said he wouldn't price the wethers until Shaw returned from Portland, Oregon.

Q. Did he tell you when he was expecting Shaw back?

A. In a few days he said.

Q. Did he tell you anything about the character and condition of these sheep, I mean the Shaw and the Shaw and Gowan wethers?

A. He said they were yearlings and two year old wethers and that they ought to be in fair flesh.

Q. Tell you anything about what they were worth?

A. No, sir; not at that time.

Q. He did afterwards?

A. He afterwards asked me, about two weeks later he asked me, if they were worth $2.50 per head and I told him no that I wouldn't think of giving that price for them on the present market.

(Deposition of John R. Bonson.)

Q. Was that conversation with reference to the price at a time when you had personally examined the sheep?

A. Yes, sir; that was on the ground while we were looking at the sheep over near Hailey, Idaho.

Q. During the week or more that you were stopping sleeping at his home with Mr. Eaton and stopping with him immediately after your arrival at Caldwell, Idaho, did you have any other conversation with him about the bands of wethers in Boise County, near Hailey?

A. We had a good many conversations but they were all of about the same nature, that he had charge of the sheep but that he wouldn't offer them for sale or price them until Shaw returned from Portland, Oregon.

Q. Did he give you any reason why he wouldn't offer them for sale or name any price?

A. Well, from his conversation Shaw was the main owner but that Gowan had charge of the sheep.

Q. What was the nature of the interest which Gowan claimed to have in these sheep as evidence by his conversations with you at the time, I mean in the Shaw or Shaw and Gowan wethers?

A. From his conversation I took it that he got a thousand dollars a year for managing the business, running these sheep.

Q. Then I am correct in the statement that Gowan gave you to understand that his sole interest in the Shaw or the Shaw and Gowan wethers was that Shaw owed him for his services in taking care of the sheep?

(Deposition of John R. Bonson.)

A. Yes, sir; he owed him for his services in taking care of the sheep and also that there was an unsettled account between them or an undivided feeding account that hadn't been settled at that date between Shaw and Gowan.

Q. Growing out of a partnership deal in feeding other sheep?

A. Other sheep at previous times in Nebraska and also in buying and selling several bands of sheep in Wyoming and Idaho in the winter of 1901 and 1902.

Q. That is the winter preceding the one that you were there? A. Yes, sir.

Q. Did you have any conversation with J. B. Gowan shortly after your arrival there in which he described to you the financial condition of Shaw?

A. Not the first few days he didn't say anything about the financial condition of R. L. Shaw during the first few days, but later he did speak of Shaw as having mortgaged all his sheep to the George, Adams Frederick Company of Omaha and the Flato Commission Company and that Shaw was gone and that he thought he had skipped the country for good.

Q. About what date did you have this conversation with Gowan in which he told you about Shaw having mortgaged his sheep to these different people that you have mentioned?

A. About the 17th or 18th of June, 1902.

Q. Did he at that time or at any other time tell you when it came to his knowledge that these sheep were

(Deposition of John R. Bonson.)

mortgaged to the Flato Commission Company and the George, Adams Frederick Company or to either of them?

A. Yes, sir, he said he had just looked up the records and found out.

Q. Did you have any further conversation with him at this time with reference to his affairs and Shaw's?

A. Yes, he said that he had been hoping that Shaw would return and settle up with him and pay him what Shaw was owing him, he claimed that there was quite an amount of money due him on an old feeding account and the profits of some previous deals in Idaho, Wyoming and Nebraska, from feeding sheep and that he also had advanced some of his own money for paying the expenses of running the Shaw and Gowan sheep.

Q. When you speak of the Shaw and Gowan sheep you mean the sheep which Gowan gave you to understand that he received a thousand dollars a year for running? A. Yes, sir.

Q. That is the two or three bands of Shaw wethers which were near Hailey? A. Yes, sir.

Q. Did he tell you what his relations to Shaw were in the former deals in Nebraska, Wyoming and Idaho?

A. It was a partnership deal, Gowan was interested in the profits or losses of the deals.

Q. About how long was it after you first went out there and first met Gowan in June, 1902, that you had this conversation with him in which he told you that these sheep were all mortgaged?

A. About ten days.

(Deposition of John R. Bonson.)

Q. Up to that time, that is up to the day when he told you these sheep were mortgaged to the parties whom you have mentioned, who had Gowan always spoken of as the owner of these sheep and what had he always mentioned his relation to them as being?

A. Well, he represented them as the Shaw wethers or sometimes he would speak of them as the Shaw and Gowan deal or the Shaw and Gowan sheep, and that he had charge of them or that he was running the sheep.

Q. Did you meet and were you acquainted with Ralph Cowden of Caldwell, Idaho, prior to the 17th day of June, 1902?

A. I think I first met Cowden about the 13th or 14th of June, at Caldwell, Idaho, at his office.

Q. What business was he engaged in at that time?

A. He was engaged in the lumber business.

Q. Have any conversation with him about buying sheep at that time?

A. I told him we were out looking over the country to see what could be bought.

Q. Did he have any sheep for sale at that time?

A. He had some but he didn't offer them for sale.

Q. Did he describe them to you?

A. Yes, sir, he described several bands of ewes and lambs that he had up near Council and that he and Gowan were in the deal.

Q. Did he described any other sheep than ewes and lambs that were owned by him or by him and Gowan?

A. No, sir.

(Deposition of John R. Bonson.)

Q. On the same date did you have any conversation with him with reference to R. L. Shaw?

A. Yes, sir; he spoke of Shaw being away and that he hoped he would came back and fix up some business matters with Gowan because he wanted Gowan to put some money into their sheep deal.

Q. Did he say anything further about Shaw at that time? A. Not at that date.

Q. Did he at that time say anything to you about having made a purchase of the Shaw or Shaw and Gowan sheep? A. No, sir.

Q. Did he say anything to you at that time about owning the Shaw or Shaw and Gowan sheep?

A. No, sir.

Q. Was there anything said in that conversation about the wethers known as the Shaw or Shaw and Gowan wethers?

A. Yes, sir; he spoke of Gowan as having charge of them and running the sheep but nothing further than that.

Q. When did you next after the date which you have mentioned, which I believe you have described as the 13th of June, did you have any conversation with Cowden with reference to the Shaw wethers?

A. About the 21st of June Cowden told me that he had a bill of sale of these wethers given him by Gowan and that the sheep belonged to him now, he also told me a day or two preceding the 21st of June, 1902, that Shaw had mortgaged his stuff and left his stuff in bad

(Deposition of John R. Bonson.)

shape financially and that he thought he had skipped the country for good.

Q. Did Cowden at the time mentioned in the latter part of your answer when he told you about his belief that Shaw's property was mortgaged go into details as to why he thought this to be so and if so state what they were? A. I don't think he did.

Q. Did he state to you at that time when it first came to his knowledge that Shaw had mortgaged his stuff?

A. He didn't tell me when it came to his knowledge but it was a day or two previous to about June 21st, that he knew it.

Q. Did he at any time tell you when he first found out that Shaw's stuff, as you speak of, was mortgaged?

A. No, sir; any more than when I first met him he never mentioned the matter of Shaw's stuff all being mortgaged, it wasn't mentioned during our first conversations at all.

Q. At the time when he told you, one or more days prior to June 21st, 1902, that the Shaw sheep were mortgaged or the Shaw stuff, as mentioned by you, had he ever told you that he claimed to have any interest whatever of any kind in the so-called Shaw or Shaw and Gowan wethers?

A. He never represented to me as having any interest in them at all prior to the time that he told me that he had a bill of sale of them.

(Deposition of John R. Bonson.)

Q. Are you positive that the date when he first informed you that he had a bill of sale of the Shaw sheep or the Shaw and Gowan wethers was of a later date than the date on which he told you that all of Shaw's stuff was mortgaged?

A. Yes, sir; it was at a later date, several days later.

Q. Had you and Cowden ever had any talk with reference to what stuff Shaw had in Idaho, or putting it in another way, what property and what sort of property do you mean when you say Shaw's stuff?

A. I meant the several bands of yearlings and two year old wethers near Hailey, Idaho.

Q. Was that the reference made by Cowden at the different times when he spoke to you of Shaw's stuff being mortgaged? A. Yes, sir.

Q. Did he ever speak to you of Shaw having any other property than the different bands of one and two year old wethers?

A. No, sir; he never spoke of Shaw having any other interests in that country outside of the wethers.

Q. Do you know how many head there were and where they were supposed to be located?

A. They were about 30 miles southwest of Hailey, I take it to be southwest the way we drove going there.

Q. How did he speak of their location?

A. He spoke of them as being in the Hailey Country.

Q. Prior to the 21st of June, 1902, when Cowden first told you that he had a bill of sale for the Shaw wethers

(Deposition of John R. Bonson.)

had you ever had any conversation with him with reference to the purchase of these wethers?

A. Yes, sir; I told Cowden that on Shaw's return I might go out and take a look at them, the wethers I mean, with a view of buying them.

Q. How did you come to tell Cowden these facts?

A. Cowden asked me if I was going out to look at them.

Q. When was it that Cowden told you that the Shaw sheep were mortgaged with reference to the time that Gowan had told you that Shaw had mortgaged them?

A. It was at a later time when Cowden told me that when Gowan told me, or it was the same day, but a day or so later.

Q. Did Gowan ever tell you in round numbers the amounts of the mortgages which George, Adams, Frederick Company and the Flato Commission Company held against these sheep?

A. Yes, sir, he told me that George, Adams, Frederick Company held about $16,000.00 and the Flato Commission Company about $18,000.00.

Q. Did he ever tell you anything about why these mortgages were given and what was done with the money? A. No, sir.

Q. Did Cowden ever tell you when the bill of sale in question and to which you have referred was executed to him by J. B. Gowan?

A. It was about the 21st or 22d day of June, 1902,

(Deposition of John R. Bonson.)

that he made the remark to me that Gowan had just given him a bill of sale for them.

Q. Are you sure that those are the words, "Had just given him a bill of sale," are you? A. Yes, sir.

Q. Had he ever prior to that date ever claimed to have any interest in the Shaw or Shaw and Gowan wethers? A. No, sir.

Q. Had J. B. Gowan ever prior to that date claimed to have any interest as owner in the so-called Shaw or Shaw and Gowan wethers?

A. No, sir, he never spoke of the sheep as him being one of the owners but he did make the remark previous to that time that if he sold us the sheep he would sell them as the Shaw wethers and he did claim also that Shaw was owing him for money advanced in taking care of these sheep and an unsettled profit on some former deals or an undivided profit on some former deals.

Q. Had he ever at any time offered to sell these sheep of Shaw and Gowan?

A. No, sir; he wouldn't price me the sheep at all nor offer me the sheep for sale until after Shaw's return from Portland, Oregon, but Shaw never returned, but after June 22d or about the 23d I went to Hailey, Idaho, and there met Gowan and we went out to look at the sheep and he offered the sheep for sale as the Cowden wethers.

Q. Did he tell you that they were the same sheep that he had before described as the Shaw wethers?

(Deposition of John R. Bonson.)

A. No, sir; he didn't; but he described the brands on the wethers previously as being the Shaw brands and when we got there those were the brands the sheep had.

Q. Describe that brand?

A. I noticed some with a quarter circle G brand and some with an S brand and a quarter circle G brand.

Q. All made with black paint?

A. Black or red, the brands had growed dusty and you couldn't tell whether it was red or black paint.

Q. Had Gowan described to you the brands which were on the Shaw wethers prior to the time when you went up there? A. Yes, sir.

Q. And were the brands of which you have just given a description the ones which he told you were on the Shaw wethers? A. Yes, sir.

Q. What were the brands which you found upon the Cowden wethers which Gowan offered for sale to you about the 23d of June, 1902, in the vicinity of Hailey, Idaho.

A. They were branded with a quarter circle G, with black or red paint and some branded S, and a quarter circle G, with black or red paint. I say black or red paint on account of the brands being full of dust and you couldn't tell originally whether it had been black or red paint.

Q. Did the brands correspond on the location on the sheep described by Gowan as the Shaw sheep prior to the time when you went there into the Hailey country

(Deposition of John R. Bonson.)

with the location of the brands on the sheep which he showed to you when you went there?

A. They were represented as being branded on the back with that brand, and that's the way I found them branded.

Q. Did you ever have any conversation with J. B. Gowan while with him in the vicinity of Hailey on or about the 23d of June, 1902, as to whether the sheep which he showed you were the same sheep, the same identical sheep which he had before talked to you about as belonging to R. L. Shaw and being for sale?

A. Yes, he said he had sold his sheep to Cowden and that he would sell me the sheep as Cowden's sheep.

Q. At the time that you were up there to see them did he make you any offer on these sheep, any price that he would sell them at?

A. He asked me if I would give $2.50 a head for them.

Q. What did you say to that?

A. I told him they wasn't worth $2.50, that if I was buying them I would give $2.00.

Q. What further conversation was there had at this time as to the value of these sheep?

A. Well, I don't remember.

Q. How many bands of Shaw sheep, or as they were then called Cowden sheep were shown you by Gowan when you were in the vicinity of Hailey on or about the 23d of June and about how many head if you know?

(Deposition of John R. Bonson.)

A. There was two bands of about twenty-eight or twenty-nine hundred each, that was the amount the herder claimed there was in the two bands, that is 2,800 or 2,900 in each band or 5,600 or 5,700 in the two bands.

Q. Do you remember who was herding these sheep?

A. No, sir, I don't, the foreman's name was Parks, I believe.

Q. You looked these sheep over carefully at the time that you were there? A. Yes, sir; I did.

Q. What condition were they in, what grade of sheep?

A. They were what we would call a heavy pelted sheep, not the best of sellers but in fair flesh.

Q. Do you know what the value of such sheep was in the summer of 1902?

A. I could only tell by referring to the market reports of that date owing to lapse of time.

Q. Referring back to your conversation with Cowden with reference to Shaw and these sheep did Cowden at any time prior to June 21st tell you anything further than what you have already stated as to Shaw having mortgaged his sheep?

A. He said that Shaw had mortgaged a lot of stuff to different eastern people and had skipped the country.

Q. Did Gowan or Cowden at any time tell you when the bill of sale testified to by you was executed?

A. No, sir; they didn't give me the date; it was about the 20th of June, 1902.

(Deposition of John R. Bonson.)

Q. How do you fix the 20th of June as the date to which they referred?

A. That was about the date that Cowden told me that he had just gotten a bill of sale of these sheep.

Q. Those were the words that he used, "just gotten a bill of sale of those sheep," were they?

A. Yes, sir.

Q. And he made that statement to you that he had just gotten a bill of sale of those sheep on that day?

A. Yes, sir; about the 20th or the 21st of June.

Q. Who first spoke to you about the bill of sale having been given Gowan or Cowden? A. Gowan.

Q. What did he say to you in the same connection when he spoke to you?

A. He said he had sold the sheep to Cowden.

Q. Give you any reason why?

A. Yes, he did; he claimed Shaw was owing him six to eight thousand dollars and thought he ought to protect himself if he could and asked me if I blamed him for protecting himself in that way.

Q. That was about how long after he had first offered the sheep for sale to you as the Shaw sheep?

A. About ten days.

Q. That would place it about what date in June?

A. About the 20th or a day or two prior to that time.

Q. Had Gowan at any time prior or did he at any time after claim to have title to the so-called Shaw sheep?

(Deposition of John R. Bonson.)

A. He never claimed to have any title to them.

Q. Did he claim to have any interest in them whatever other than that Shaw was owing him six or eight thousand dollars?

A. He never told me that he had any interest in these particular sheep; still he referred to them as the Shaw wethers and the Shaw and Gowan sheep but he never claimed as being the owner or part owner of these sheep.

Q. You are positive that at no time prior to the 20th or at most the 18th or 19th of June, 1902, that no mention was ever made to you by either J. B. Gowan or Ralph Cowden of the fact that a bill of sale of these sheep had been made by Gowan to Cowden?

A. No, sir. No mention had ever been made to me prior to that time.

Q. And from the time that you arrived at Caldwell on the 7th or 8th of June up to the time when you say he spoke to you about the bill of sale and asked you if you blamed him for doing what he had done as testified to by you on a day somewhere from the 18th to the 20th of June, 1902, you had talked with him how frequently?

A. Most every day.

Q. And during almost every day talked to him with reference to buying them? A. Yes, sir.

Q. And did he ever at any time during this period say to you that he had a right to sell these sheep or had any title to them or any portion of them?

A. No, sir.

(Deposition of John R. Bonson.)

Q. How did he say he owned them, I mean prior to the date when he told you he had given a bill of sale as mentioned by you?

A. He told me on Shaw's return he would be in a position to price the sheep to me and offer them for sale.

Q. On the date mentioned by you as when you was told by Gowan that a bill of sale had been given by him to Cowden for these sheep did he say anything to you about Shaw returning?

A. He told me that Shaw hadn't returned and that he didn't think he ever would.

Q. Had he ever indicated such a thought to you prior to that day? I mean that he wouldn't return?

A. No, sir.

Q. Had he or had he not up to the date mentioned sometime from the 18th to the 20th of June, 1902, constantly told you that he was expecting Shaw back from Portland, Oregon, any day and that he would be in a position to price the sheep to you when he came back?

A. Yes, sir; he always spoke of Shaw returning up to the date about the 18th of June, I mean the date when he told me that he had sold the sheep to Cowden and asked me if I blamed him for it.

Q. Did Gowan ever tell you anything about on what basis he took care of the Shaw sheep?

A. He at one time told me that he got a thousand dollars a year for running Shaw's sheep business.

Q. Did Gowan ever tell you about having been interested in any sheep there?

(Deposition of John R. Bonson.)

A. He told me about having an interest with Cowden in some ewes and lambs.

Q. When did he tell you that?

A. I took that from his letter that I seen prior to June 7th and he also told me on several different occasions between June 7th and June 18th or 20th.

Q. Tell you anything about on what basis he was taking care of these sheep? A. No, sir.

Q. Didn't say anything about whether he was getting a salary of a thousand dollars a year or any other amount for taking care of these sheep?

A. No, sir.

Q. What is your age? A. 31.

Q. What business have you been engaged in for the last 13 or 14 years principally?

A. Farming, cattle feeding, buying and selling stock and cattle, hogs and sheep feeding.

Q. With whom have you been engaged in business during most of that time?

A. With my father most of the time whose name is Nick Bronson and who resides at Grand Island, Nebraska.

Q. For how many years have you been engaged to any extent in the business of buying and selling sheep?

A. For the last ten years.

Q. Are you familiar with the market price of sheep during that period? A. Yes, sir.

Q. In the business of buying and selling sheep during the period mentioned, how did you determine the

(Deposition of John R. Bonson.)

prices at which you bought and the prices at which you would sell or sold?

A. I always based the values by what they would bring at the livestock centers or sheep bought in the west should be bought at prices sufficiently low that by adding freight and other shipping expenses that they would sell on the market without a loss and whatever they net gives you the value on the range or at the western section.

Q. In selling sheep what determines you in fixing the prices at which sold where they are not sold in the principal markets?

A. All values at all times are based on what sheep will bring at the principal livestock centers as Chicago, Omaha and St. Joe and Kansas City.

Q. Do you know of sheep having a market value except as related as determined and fixed by their selling price at these markets? A. No, sir.

Q. Do you know or have you known of sheep having a market value in Idaho or elsewhere in the last 15 years except by reference to the selling prices at these principal livestock centers at which they are sold?

A. No, sir, all sheep values are determined by what they will bring at the principal markets especially wethers, whose values are what they would bring at the principal markets and the values they would bring at the principal markets are as staple as corn, wheat, oats, cattle and hogs.

(Deposition of John R. Bonson.)

Q. Do you expect to be in the vicinity of Boise, Idaho, in the near future? A. No, sir.

Q. About how far is it from here to Boise, Idaho?

A. About thirteen or fourteen hundred miles.

Witness excused.

JOHN R. BONSON.

O. W. EATON, the witness who was temporarily withdrawn by counsel for defendant, was again called and testified as follows, to wit:

(Examination by Mr. B. F. NEAL.)

Q. Where did you make your headquarters, where did you room while stopping at Caldwell, Idaho, when stopping there in the summer of 1902?

A. We stopped first at the depot hotel for two or three days and after that I lodged at Gowan's; his wife was away from home, I understood at Grand Island on a visit; we just simply slept there nights for three or four nights.

Q. You mean that after you moved there from the hotel that you just stayed there three or four nights or all the balance of the time?

A. All the balance of the time is my recollection.

Q. On or about what time did you arrive at Caldwell? A. About the 8th.

Q. And about what date did you leave?

A. Somewhere about from the 15th or 17th of June.

Q. During the time that you were stopping at Gowan's or at the hotel mentioned and at the time men-

(Deposition of O. W. Eaton.)

tioned did you have any conversation with Gowan with reference to the purchase of sheep?

A. Why, I didn't have but a very little conversation, he spoke of he and Cowden running ewes and lambs together.

Q. Did he at time state to you that he had any wethers or any interest in any wethers in the State of Idaho?

A. No, sir, never did, nothing but ewes and lambs, no wethers at all.

Q. Did you ever tell him why you were there, what your mission or business in that locality was?

A. Yes, sir, I told him we were there for the purpose of purchasing wethers to put on the market.

Q. Did he talk to you about selling you any wethers?

A. Yes, sir, he did.

Q. What wethers did he tell you about?

A. He said he had for sale, he didn't say they were his but he said he had for sale between five and six thousand wethers, this Gowan, yearlings and two year old wethers.

Q. Did you have any further conversation with him prior to the time you say you left there on or about the 15th or 17th of June, 1902, in which he told you whose sheep they were?

A. Yes, sir, I had a conversation with him later after returning from Weiser and Huntington.

Q. When did you arrive at Caldwell, Idaho?

A. On the 7th or 8th of June, 1902.

Q. And how long did you stay there?

(Deposition of O. W. Eaton.)

A. I stayed there three or four days, that is until about the 11th or 12th and then went to Weiser and Huntington, being gone over night.

Q. And then where did you go?

A. Back to Caldwell returning on the 13th or 14th, I then remained at Caldwell, stopping at Gowan's until some time from the 15th to the 17th of June, 1902, when I returned home leaving John R. Bonson, there.

Q. At about what date was this that you had this that you had this last conversation with Gowan that you have just testified to?

A. Some time between the 11th and 17th, it must have been about the 14th of June, 1902.

Q. What further did he tell you with reference to the wethers near Hailey with reference to which he had spoken to you before?

A. He told me at that time that Shaw hadn't returned and that he didn't care to sell them until Shaw returned, he didn't speak of having any interest in them at that time.

Q. Did he ever speak to you or in your presence of ever owning the title to those sheep? A. No, sir.

Q. Who did he speak of as owning these sheep?

A. R. L. Shaw.

Q. About how many head of these sheep did he say there were?

A. He said there were two bands, he thought about 2,900 in a band, he spoke as there being between 57 and 5,900.

(Deposition of O. W. Eaton.)

Q. What age and description of sheep did he say they were?

A. He said they were on what we call a merino order and that some of them were rather pelty.

Q. Did he price them to you?

A. No, sir, he didn't want to price them until Shaw returned I let that to Bonson.

Q. Did he tell you anything about Shaw's financial condition?

A. He spoke about him as being heavily in debt but didn't speak about any mortgages.

Q. Did you have any other or further conversation with Gowan, J. B. Gowan with reference to these bands of sheep? A. No, sir, that was all.

Q. Did you make any offer to buy them at that time?

A. No, sir, well, I couldn't very well, he didn't want to sell them until Shaw returned.

Q. Did he give any reason why he wouldn't sell them until Shaw's return?

A. He represented that Shaw owned the sheep and that he wouldn't sell them until he returned.

Q. About what time did you have your last conversation with him when he made such representations to you?

A. It was about the 14th or 15th of June, 1902.

Q. Did he ever make any different representations to you at a later day? A. No, sir.

Q. Or prior to that time? A. No, sir.

(Deposition of O. W. Eaton.)

Q. Up to the time that you left Caldwell for return to Nebraska, between the 15th and 17th as testified to by you, had Shaw returned to Caldwell on that vicinity to your knowledge? A. No, sir.

Q. Had Gowan at any time made any figures to you or any basis on which he would sell these sheep?

A. No, sir, he never made any offer at all.

Q. Do you know how much longer John R. Bonson stayed there after you left?

A. No, sir, I don't positively; he went to look at these sheep, I talked with him when he come back, it was the very last of June or the first part of July that he returned, that's my recollection.

Q. Did Bonson remain longer on account of some arrangements you had with him because of your trip west?

A. Yes, sir, we had some hopes that we would get these sheep.

Q. You didn't see the sheep yourself?

A. No, sir.

Q. Did Gowan describe the marks and brands on these sheep to you?

A. No, sir, I didn't ask him and he didn't describe them.

Q. Did you hear Gowan say anything to Bonson about staying longer after you left?

A. Yes, sir, I heard him invite him to stay and go and look at these sheep.

Q. Did you understand why he wanted him to stay longer, stay to a later date?

(Deposition of O. W. Eaton.)

A. I understood he wanted him to stay and look at these sheep, I think he wanted him to wait a few days for Shaw to return; he was expecting Shaw every day and he gave me to understand that he couldn't sell the sheep until Shaw's return.

Q. Did you ever have any conversation with Gowan with reference upon what basis he was caring for the so-called Shaw wethers over near Hailey, I mean whether or not he was receiving or was to receive any pay for his services.

A. Yes, sir, I understood him that he was at work on a salary, he didn't tell me the amount and I didn't ask him, but he gave me to understand that he was taking care of them on a salary.

Q. By giving you to understand you mean do you that he was working for a salary in caring for the Shaw sheep? A. Yes, sir.

Q. Did he tell you what, if any, compensation he was receiving for caring for the so-called Cowden and Gowan ewes and lambs?

A. I understood he was in partnership on the ewes and lambs.

Q. Did he say anything about being paid for his services in caring for them?

A. Not for the Cowden ewes and lambs.

Q. Did he at any other time by direction, words or otherwise, indicate that he claimed any title as a partner or otherwise in any of the so-called Shaw wethers?

(Deposition of O. W. Eaton.)

A. No, sir, only simply working on a salary, no claim of title whatever.

Q. Where did he tell you the Shaw wethers were located at that time?

A. Over near Hailey in what they called the Wood River Country.

Q. Where did he tell you that the Gowan and Cowden ewes and lambs were located?

A. Up near a place or town they called Council.

It being six o'clock P. M., the further taking of the deposition is adjourned until the hour of nine o'clock A. M. on Friday, April 28, 1904, at the same place as nereinbefore described.

B. F. Neal, attorney for defendants, and the witness, O. W. Eaton, being present, and it being of the hour of nine o'clock A. M. of April 28, 1904 (Friday), the further taking of the deposition is continued as per adjournment, at the office of Abbott & Abbott, before O. A. Abbott, the Notary Public.

(Examination by B. F. NEAL.)

Q. Did Gowan ever tell you or by any words or acts give you to understand that any person other than R. L. Shaw owned or claimed to own ony of the two bands of wethers located in the Wood Country near Hailey?

A. No, sir, never did.

Q. Did he say at any time to you or in your presence that Ralph Cowden owned part of them?

A. No, sir, never mentioned his name.

(Deposition of O. W. Eaton.)

A. I understood he wanted him to stay and look at these sheep, I think he wanted him to wait a few days for Shaw to return; he was expecting Shaw every day and he gave me to understand that he couldn't sell the sheep until Shaw's return.

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Q. Did he say at any time to you or in your presence that Ralph Cowden owned part of them?

A. No, sir, never mentioned his name.

(Deposition of O. W. Eaton.)

Q. Did he say at any time that he himself owned part of the or had an interest in part of them?

A. No, sir.

Q. You met Ralph Cowden occasionally while there?

A. I was in his office once or twice.

Q. What business was he engaged in at that time?

A. Lumber business.

Q. Talk to him about sheep?

A. Yes, sir, he spoke about running these ewes and lambs with Gowan.

Q. Where did you say they were located?

A. I think he said they were located—if I get the direction right—north, near Council up in that country.

Q. Did he speak about having any other sheep up in Idaho other than the ewes and lambs?

A. No, sir, I didn't hear him mention any others.

Q. Did he speak to you at any time about Gowan having any sheep or any interest in any sheep except those that he owned with Cowden? A. No, sir.

Q. When did you have your last conversation with Ralph Cowden?

A. I think about the 14th, right about that time, I couldn't give the date, June 14th, 1902, I think.

Q. Did you have any conversation with him with reference to R. L. Shaw after that?

A. No, sir, but very little; he spoke as though they expected Shaw back soon.

Q. Did you have any conversation with him with reference to Shaw's sheep being mortgaged?

(Deposition of O. W. Eaton.)

A. No, sir, none at all.

Q. How old are you? A. 68.

Q. For how many years have you been engaged in the sheep business? A. About 30 years.

Q. What has been the nature of the sheep business that you have done during that period?

A. During that time I run sheep in Kansas on the range with a partner, Mr. Gifford, a brother in law of mine, for six or eight years, and since that time my business has been confined to feeding sheep during the winter, fattening them for market.

Q. How have you usually disposed of your sheep?

A. Fattened them and sold them in Omaha and Chicago.

Q. Have you been engaged to any extent in the business of buying and selling sheep?

A. Yes, sir, to considerable extent.

Q. Give it as near as you can, for the last 15 years—describe what you have been doing?

A. Going into the western states, Idaho, New Mexico, Utah and Oregon, and driving sheep through, I never drove through but once, I was connected with 14,000 and drove clear through from Oregon, bought them in Oregon and sold part of them here to feeders and fed part of them myself.

Q. What experience other than that have you had?

A. I have bought and sold to feeders considerable.

Q. About how many have you handled personally every year?

(Deposition of O. W. Eaton.)

A. From six to ten thousand.

Q. Through the period mentioned by you?

A. Perhaps not every year but it would run along that number.

Q. Upon what do you base the price or did you base the price and would have paid for sheep when buying and the prices you would have asked for and received usually when you have sold sheep?

A. On the markets in the livestock centers, principally Omaha, Chicago and St. Joe.

Q. Is there to your knowledge or has there ever been during the time during which you have handled sheep a market value for sheep except the relative market value with reference to the prices at which sheep are bought and sold in the general livestock sales points as at Chicago, Omaha and St. Joe.

A. Yes, sir; those are the markets we buy on, the prices we pay for sheep wherever we buy them is governed by the price at which they can be sold for on the principal markets by adding to the cost price the price of transportation from the place of purchase to the place of selling, we determine the price which we will pay.

Q. So far as you know and based upon your experience as a dealer and your general knowledge, do you know of any market value in the State of Idaho or any other State for sheep except as based upon the current prices at the time in the markets of the United States as for instance Omaha, Chicago and St. Joe?

(Deposition of O. W. Eaton.)

A. No, sir, I don't.

Q. Do you know of any way of arriving at the market prices except by taking as a basis the current market price in these sales markets?

A. No, sir, I don't. I wouldn't attempt to buy sheep on any other basis except by taking into consideration the current prices in Chicago, Omaha and St. Joe markets.

Q. How do those current prices generally compare with each other on a given day?

A. About all the same at the different points, some may be farther away; we think we can do a little better by going to Chicago, but it's about a stand-off.

Q. With your experience as a sheep dealer have you ever bought sheep upon any other basis than upon the the market price that is determined by the market price upon which sheep were selling at the principal markets?

A. No, sir.

Q. In your judgment is there any other market price than that founded upon that basis?

A. I don't know of any other way to buy sheep safely.

Q. Where is Wood River, Nebraska?

A. Sixteen miles west of here.

Q. And about how far from Boise, Idaho?

A. It must be 1400 miles.

Q. Have you any intention of being or will you prob-

(Deposition of O. W. Eaton.)

ably be in the vicinity of Boise, Idaho, in the near future?

A. No, sir, I don't think I will.

O. W. EATON.

Witness excused.

State of Nebraska,
County of Hall,—ss.

I, O. A. Abbott, a notary public duly commissioned and qualified for and residing in the county and State aforesaid, do hereby certify that O. W. Eaton and John R. Bonson were by me severally duly sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions by them respectively subscribed and each sheet whereof has been further verified by their respective signatures upon the margin thereof were reduced to writing on a typewriting machine by O. A. Abbott, Jr., who is not related to or counsel for either party or otherwise interested in the result of this suit, and in the presence of each witness respectively, and were by said witnesses subscribed and verified in my presence and were taken at the time and in the place in the annexed notice and agreement specified, and I further certify that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit, and that the taking of said depositions was commenced at the time in said notice specified and was continued by adjournments from day to day as set forth in the body of said depositions, that is to say, from the 26th

day of April, A. D. 1905, to the 28th day of April, A. D. 1905, both of said days included.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 28th day of April, A. D. 1905 (nineteen hundred and five).

[Seal] O. A. ABBOTT,
Notary Public.

My commission expires Nov. 20, 1909.

O. A. ABBOTT,
Notary Public.

FEES.

O. W. Eaton, witness:

Mileage, 16 miles	$ 1.60
Witness fees, three days	6.00
John R. Bonson, witness:	
Mileage, 50 miles	$ 5.00
Witness fees, two days	4.00
Swearing witnesses two at $.10	.20
Certificate and seal	$ .25
Transcribing depositions on typewriter	$26.60
County clerk's certificate	
Postage and registry	.22
Total	$43.87

State of Nebraska,
Hall County,—ss.

I. J. L. Schaupp, county clerk of the county aforesaid, do hereby certify that O. A. Abbott, an acting notary

public within and for said county, duly qualified to act as such, that all of his official acts are entitled to full faith and credit when executed within the period named, to wit: Commencing December 12th, 1903, and ending November 20th, 1909, the last-named date being the date of the expiration of his commission.

In testimony whereof, I have hereunto subscribed my name and affixed the official seal of said county at my office this 28th day of April, 1905.

[Seal] J. L. SCHAUPP,
County Clerk.

(Title and Caption Omitted.)

Notice to Take Depositions of O. W Eaton and John R. Bonson.

District of Idaho,
County of Ada,—ss.

To William Finney, Plaintiff, and W. E. Borah, his Attorney:

The above-named plaintiff will take notice that on the 26th of April, 1905, the said defendants, and each of them, will take the depositions of O. W. Eaton and John R. Bonson, witnesses to be used as evidence on the trial of the above-entitled cause at the law offices of Abbott and Abbott, in the city of Grand Island, in the county of Hall, State of Nebraska, between the hours of 9:00 A. M. and 6:00 P. M. of said day, and the taking of said depositions will be adjourned from day to day (not in-

cluding Sundays and legal holidays) between the same hours until they are completed.

MORRISON & PENCE and
NEAL & KINYON,
Attorneys for all Defendants.

Received copy of the above notice this 15th day of April, 1905, and consent is hereby given that said depositions may be taken at the time and place in said notice specified, subject to all objections for competency, relevancy and materiality.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Depositions of O. W. Eaton and Jno. R. Bonson. Filed May 3d, 1905. A. L. Richardson, Clerk.

Plaintiff's Exhibit "A."

In the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County.

RALPH COWDEN,
Plaintiff,
vs.
WILLIAM FINNEY, Sheriff of Blaine County, State of Idaho,
Defendant.

Complaint.

Comes now the plaintiff herein and for cause of action against the defendant alleges:

1. That the defendant, William Finney, now is and during all the times herein mentioned has been the duly elected, qualified and acting sheriff of the county of Blaine, State of Idaho.

2. That on the first day of July, 1902, in the county of Blaine, State of Idaho, the plaintiff was the owner and in possession and entitled to the possession and ever since said time has been the owner and entitled to the possession of the following described chattels, of the value of eighteen thousand four hundred and seventy-four dollars ($18,474.00) to wit: Fifty-four hundred and sixty-nine (5469) head of sheep wethers, said sheep being branded with paint on wool as follows: Quarter circle G "G" said sheep being known as the Cowden bands of sheep.

3. That defendant as sheriff of said County on the 24th day of July, 1902, in the county of Blaine, State of Idaho, and at a time when the plaintiff was the owner and in possession and entitled to the possession of said property and all thereof and without the plaintiff's consent wrongfully took said goods and chattels from the possession of the plaintiff into the possession of the defendant.

4th. That before the commencement of this action, to wit, on the 31st day of July, 1902, before the filing of this complaint, the plaintiff demanded the possession of said goods and chattels.

5th. That said defendant still unlawfully and without right, withholds and denies said goods and chattels and all of the same from the possession of the plaintiff

to his damage in the sum of eighteen thousand four hundred seventy-four dollars ($18,474.00), the value of the sheep, and three thousand dollars ($3,000.00) damages for the detention of the same.

Wherefore, plaintiff prays judgment against defendant, first, for the recovery or possession of said goods and chattels or for the sum of eighteen thousand four hundred and seventy-four dollars ($18,474.00), the value thereof in case return cannot be had; second, for three thousand dollars ($3,000.00) damages and for costs of this suit.

W. E. BORAH, and
FRANK J. SMITH,
Attorneys for Plaintiff.

State of Idaho,
County of Blaine,—ss.

Frank J. Smith, being first duly sworn, deposes and says, that he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge. This verification is made by affiant as attorney for plaintiff, for the reason that all of the facts herein alleged are within the knowledge of this affiant.

[Seal] FRANK J. SMITH.

Subscribed and sworn to before me this 31st day of July, 1902.

W. E. HEARD,
Clerk of District Court.

[Endorsed]: Filed July 31st, 1902, at 4:15 P. M. W. E. Heard, Clerk.

(Title and Caption Omitted.)

Demurrer

Comes now the defendant and demurs to the complaint of the plaintiff herein, upon the grounds that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, defendant prays to be hence dismissed with his costs in this behalf expended.

HAWLEY & PUCKETT,
Attorneys for Defendant.

Service by copy admitted this 5th day of August, 1902.
W. E. BORAH.

[Endorsed]: Filed August 6th, 1902. W. E. Heard, Clerk. By Geo. A. McLeod, Deputy. Filed Feb. 18th, 1903. John A. Tucker, Clerk. Filed December 20th, 1902. J. H. Wickersham, Clerk.

In the District Court of the Fourth Judicial District of Idaho, in and for Blaine County.

RALPH COWDEN,

Plaintiff,

vs.

WILLIAM FINNEY, as Sheriff of Blaine County, Idaho,

Defendant.

Answer.

Comes now the above-named defendant, and by way of answer to the complaint of plaintiff filed herein, admits, denies and alleges as follows:

1st. Admits that the defendant now is, and during all the times mentioned has been, the duly qualified and acting sheriff of Blaine County, Idaho.

2d. Denies that on the 1st day of July, 1902, or at any other time, either in the county of Blaine, State of Idaho, or elsewhere, plaintiff was the owner in the possession, or entitled to the possession, or ever at any time since such day has been or now the owner or entitled to the possession of the property and chattels mentioned in plaintiff's complaint, to wit: 5,469 head of sheep, wethers, branded quarter circle G with paint on wool, or any part thereof of the value of $18,474.00, or of the value of any other sum or amount, or at all.

3d. Denies that said defendant as sheriff, or otherwise, on the 24th of July, 1902, or at any other time, in the county of Blaine, State of Idaho, or elsewhere at

any time since plaintiff was the owner or in the possession, or entitled to the possession of said sheep or property, or all or any part thereof, without the plaintiff's consent wrongfully took the said property and chattels, or part thereof from the possession of the plaintiff, or into the possession of this defendant, or otherwise.

4th. Denies that before the commencement of this action, and on the 31st day of July, 1902, or at any other time, or before the filing of this complaint, the plaintiff demanded possession of said sheep or chattels or any part thereof.

5th. Denies that this defendant still or otherwise, or unlawfully, or without right, withholds or detains said property or chattels, or all or any part of the same from the possession of the plaintiff, to his damage in the sum of $18,474.00 or any other sum or amounts as damages or otherwise, for the detention or any detention of said sheep, or any part thereof.

And for a further defense herein the defendant alleges:

1st. That from and after the 30th day of November, 1901, the Flato Commission Company, a corporation, has been and now is the owner and holder of a certain chattel mortgage covering and including the property described in plaintiff's complaint herein, given by one R. L. Shaw to secure the payment to the said the Flato Commission Company aforesaid of the sum of $18,626.55, together with interest thereon as provided in said mortgage, which said sum has never been paid or any part thereof, except as hereinafter stated, and which said

chattel mortgage was duly filed with the recorder of Blaine County, Idaho, on the 23d day of July, 1902, in book 2 of Chattel Mortgages, at page 149, and which said chattel mortgage has never been paid, canceled or satisfied, except as hereinafter stated, and was at all times since its execution in full force and effect.

2d. That on the —— day of July, 1902, proceedings were commenced to foreclose such chattel mortgage under the provisions of sections 3391 to 3398, inclusive, of Title XII, Chapter IV, of the Revised Statutes of Idaho, and the amendments thereto.

3d. That pursuant to the provisions of such statutes one George A. Hawkes, who then was and now is the agent of the said the Flato Commission Company aforesaid, the said mortgagee, made an affidavit stating the date of said mortgage and names of the parties thereto, and a full description of the property mortgaged, and the amount due thereon, together with a notice signed by said George A. Hawkes, agent of the mortgagee aforesaid, requiring the said defendant, as sheriff of Blaine County, Idaho, to take said property into the possession of the defendant and sell the same, which said affidavit and notice were placed in the hands of said defendant as such sheriff.

4th. That said defendant, as such sheriff, by virtue of such process, and not otherwise, on the 24th day of July, 1902, duly levied upon and took into his possession the sheep mentioned in said complaint, the same being at the time of such levy in the possession of Newton Parks, and said defendant did on said 24th day of July,

1902, deliver to said Newton Parks, personally, a true copy of said affidavit, together with a notice signed by said Hawkes setting forth a full description of said property, the amount claimed by virtue of said mortgage, and the time and place of selling said property.

5th. That said defendant, as such officer, made due return of such affidavit and all proceedings thereunder, and transferred the same to the clerk of said court, in whose office the same is now on file; and thereafter in accordance with the provisions of the Revised Statutes of Idaho above stated, advertised said property mentioned in said complaint for sale at public auction on the ——— day of ————, 1902, and pursuant to such affidavit and notice sold said property to George Hawkes, who was the highest bidder therefor at such sale, for the sum of $5,967.83, and thereafter in accordance with the said provisions issued and delivered to said George Hawkes his certificate of sale therefor.

Wherefore, this defendant demands judgment;

1st. That plaintiff take nothing by his complaint herein;

2d. That defendant take judgment for his costs.

HAWLEY & PUCKETT,
Attorneys for Defendant.

State of Idaho,
County of Ada,—ss.

William Finney being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the above and foregoing answer,

and knows the contents thereof, and that the same is true of his own knowledge.

WILLIAM FINNEY.

Subscribed and sworn to before me this 13th day of January, 1903.

[Seal] G. G. ADAMS,
Notary Public.

Service of above answer by copy admitted this 13th day of Jan., 1903.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Answer. Filed Jany. 13, 1903. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. Hawley & Puckett, Attorneys for Defendant. Filed Feby. 18th, 1903. John A. Tucker, Clerk.

In the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County.

RALPH COWDEN,
Plaintiff,
vs.
WILLIAM FINNEY, Sheriff,
Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 1st day of April, 1903, before the Court, without a jury—a jury having been duly waived by the parties, and Frank

Smith and W. E. Borah appearing as attorneys for the plaintiff, and Hawley & Puckett and Jas. H. Van Dusen appearing as attorneys for the defendant, and from the facts intorduced the Court finds the facts as follows, to wit:

1. That the defendant, William Finney, during all the times mentioned in the complaint was the duly elected, qualified and acting sheriff of the county of Blaine, State of Idaho.

2. That on July 24, 1902, and at all times mentioned in the complaint the plaintiff was the owner and entitled to the possession of certain sheep in number 2629; that upon said date the defendant wrongfully and without the consent of the plaintiff took said sheep from the plaintiff's possession; that the value of said property at said time of taking was $8,281.35; that demand was duly made for the return of said property prior to the time of filing the complaint in the above action, and that said return was refused, and that the sheep were afterwards sold by the defendant at public sale.

3. That the defendant, in taking possession of said sheep, was acting under and by virtue of a certain chattel mortgage dated November 30, 1901, executed by R. L. Shaw individually to the Flato Commission Company, and purporting to cover 3,500 head of yearling wethers, 3,500 ewes and 3,500 head of mixed lambs and wool described in said mortgage as being located about twelve or fifteen miles south of Boise City, Ada County, Idaho; that at the time of the execution of said mortgage, the said sheep in question in this suit were in Canyon

County, Idaho, and were then located there; that said mortgage was never filed or recorded in Canyon County, and was not filed or recorded in Blaine County until July 23, 1902.

4. That said mortgage was not verified, was executed by R. L. Shaw individually, and did not upon its face purport to cover other than individual property.

5. That 2,100 head of the sheep which were taken possession of by the defendant were sheep which had formerly belonged to the copartnership of Shaw & Cowan composed of R. L. Shaw and J. B. Gowan, which sheep the said plaintiff had purchased for valuable consideration and in good faith June 10, 1902; that at the time of said purchase the said sheep were in Blaine County; that the balance of said sheep over and above the 2,100 head were sheep which had formerly belonged to Cowden and Gowan, and in which said Shaw had never at any time had any interest; that said Cowden purchased said Gowan's interest therein about June 10, 1902; that at the time of said purchase of said sheep the said plaintiff had no actual knowledge of the existence of said mortgage above referred to; that the same was not upon record in Blaine County at the time of the purchase nor until July 23, 1902, and was never at any time of record in Canyon County.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts the Court finds that said mortgage is void as to this plaintiff and did not create any lien upon said property.

Second. That the plaintiff is entitled to judgment for the return of said property, to wit, 2,629 head of sheep branded quarter circle G, in black paint, or in case return cannot be had, to judgment against the defendant for the value thereof in the sum of $8,281.35, with interest thereon at the rate of seven per cent per annum from July 24, 1902, amounting to $516.89, total, principal and interest, $8,798.24, and for costs of suit, and it is ordered that judgment be entered accordingly.

Dated June 17, 1903.

GEORGE H. STEWART,
Judge.

[Endorsed]: Findings. Filed June 20th, 1903. John A. Tucker, Clerk. W. E. Borah and Frank J. Smith, Attorneys for Plaintiff.

In the District Court, of the Third Judicial District of the State of Idaho, in and for Canyon County.

RALPH COWDEN,
Plaintiff,
vs.
WILLIAM FINNEY, Sheriff,
Defendant.

Judgment by the Court.

This cause came on regularly for trial on the 1st day of Apr., 1903, Frank Smith and W. E. Borah appearing as counsel for plaintiff and Hawley and Puckett and Jas. H. Van Dusen for the defendant. A trial by jury having been expressly waived by the respective parties,

the cause was tried before the Court without a jury, whereupon witnesses upon the part of the plaintiff and defendant were duly sworn and examined and documentary evidence introduced by the respective parties, and the evidence being closed the cause was submitted to the Court for consideration and decision, and after due deliberation thereon the Court files its findings and decision in writing and orders that judgment be entered herein in favor of the plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid it is ordered, adjudged and decreed that Ralph Cowden, the plaintiff, is entitled to recover the possession and return of the property in question, to wit, 2,629 head of sheep branded quarter circle G, black paint, or in case return cannot be had it is ordered, adjudged and decreed that said plaintiff, Cowden, have judgment against the defendant, William Finney, sheriff, for the value of said property in the sum of $8,281.35 with interest thereon at the rate of seven per cent per annum from July 24, 1902, amounting to $516.89 total, principal and interest, $8,798.24 and for costs of suit and disbursements incurred in this action amounting to the sum of $250.60.

Dated June 17, 1903.

GEO. H. STEWART,
Judge.

[Endorsed]: Judgment. Filed June 20th, 1903. John A. Tucker, Clerk. W. E. Borah and Frank Smith, Attorneys for Plaintiff.

In the District Court, of the Third Judicial District, State of Idaho, in and for Canyon County.

RALPH COWDEN,

Plaintiff,

vs.

WILLIAM FINNEY, Sheriff of Blaine County, Idaho,

Defendant.

Judgment-Roll.

I, the undersigned, Clerk of the District Court of the Third Judicial District, State of Idaho, in and for Canyon County, do hereby certify the foregoing to be a full, true and correct copy of the judgment entered in the above-entitled action and recorded in Judgment-book 2, of said Court at page 121. And I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said action.

Witness my hand and the seal of said Court this 20th day of June, 1903.

[Seal] JOHN A. TUCKER,
Clerk.

[Endorsed]: Judgment-roll. Filed June 20th, 1903, John A. Tucker, Clerk. No. 250. Plaintiff's Exhibit "A." Filed in evidence June 3, 1905.

In the Circuit Court of the United States, District of Idaho, Central Division.

WILLIAM FINNEY,
Plaintiff,
vs.
AMERICAN BONDING COMPANY OF BALTIMORE, et al.,
Defendants.

Testimony.

Appearances:

For the Plaintiff, W. E. BORAH and F. J. SMITH.
For the Defendant, B. F. NEAL and JOHN T. MORRISON.

Boise, Idaho, June 3, 1905.

JOHN A. TUCKER, duly called, sworn and examined testified as follows:

Direct Examination.

(By Mr. BORAH.)

By Mr. MORRISON.—We would like the record to show that the same stipulations are entered into in this case as we made at the opening of the other case. Also the defendants and each of them object to the introduction of any evidence for the reason that the complaint fails to state facts sufficient to constitute a cause of action against the defendants or either of them.

By the COURT.—The objection is overruled.

(Testimony of John A. Tucker.)

By Mr. MORRISON.—Exception.

By Mr. BORAH.—It is stipulated that the evidence taken in the Mills case while the Assistant Secretary of State was upon the stand, and the stipulations and exhibits referred to shall be considered as taken in this case.

Q. Mr. Tucker, you are clerk of the court of Canyon County? A. Yes, sir.

Q. You have charge of the records in the case of Cowden vs. William Finney, sheriff of Blaine County?

A. Yes, sir.

Q. I will ask you to identify the paper handed you and state generally what it is?

A. It is a judgment-roll filed in the case of Ralph Cowden vs. William Finney.

Q. And part of the archives which are in your possession as clerk of the court?

A. Yes, sir.

By Mr. BORAH.—Plaintiff offers in evidence the judgment-roll in this case.

By Mr. NEAL.—To which the defendants and each of them object for the reason that there is no evidence that there is any privity in the action or contract between the plaintiff and defendant in this action, and the defendants or either of them in the present action; and for the further reason that the record does not show notice to the defendant, the American Bonding Com-

(Testimony of John A. Tucker.)

pany, such as is required and contemplated by law requiring it to appear and defend in the former action, and for that reason the judgment is of no effect whatever as against the American Bonding Company, and is for those reasons irrelevant, immaterial and incompetent.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(Same is admitted in evidence and marked Plaintiff's Exhibit "A.")

Q. Mr. Tucker, you may state whether or not you have the record of the entry of that judgment with you?

A. I have.

Q. Please refer to the book and page and identify the book and page?

A. The judgment is recorded in Judgment Book No. 2, District Court of Canyon County, at page 121.

By Mr. BORAH.—We now offer in evidence page 121 of the book just identified and ask leave to make a certified copy of the same to supply the record.

By Mr. NEAL.—To which the defendants and each of them object for the reasons mentioned in the last preceding objection.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(Exhibit "B.")

(Testimony of John A. Tucker.)

Q. You may refer to the other volume which you have as to the entry of judgment?

A. The judgment is docketed in Judgment Docket No. 1, District Court, Canyon County.

Q. I will ask you to read the entry in that docket referred to in the case of Cowden vs. Finney.

By Mr. NEAL.—To which defendants and each of them object for the reasons mentioned in the last objection.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(Exhibit "C.")

A. (Reading:) Judgment debtor, William Finney, Sheriff Blaine County, Idaho; judgment creditor, Ralph Cowden; amount of judgment, $8,978.24; costs $250.60; time of entry June 20, 1903; page of judgment book, Book 2, page 121.

Q. I will ask you to state whether or not, according to your records, any part of that judgment has been paid or satisfied? A. There has been no entry.

Q. It still stands as a live judgment upon the records of your office? A. It does.

By Mr. NEAL.—To which defendants object as incompetent, irrelevant and immaterial, the plaintiff not having shown notice to defendant, the American Bonding Company, such as is required by law.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(Testimony of William Finney.)

Cross-examination.

(Waived by defendants.)

Witness excused.

WILLIAM FINNEY, duly called, sworn and examined, testified as follows:

Direct Examination.

(By Mr. BORAH.)

Q. Are you the plaintiff in this case?

A. Yes, sir.

Q. And were at one time sheriff of Blaine County?

A. Yes, sir.

Q. While sheriff of Blaine County were you called upon to proceed in the matter of the foreclosure of a chattel mortgage for the Flato Commission Company?

A. I was.

Q. You may state who first called your attention to the fact that you were wanted to proceed?

A. A. J. Hawley, agent of the Flato Company.

Q. Were papers afterwards furnished you by which you should or could proceed to the foreclosure of the chattel mortgage? A. Yes, sir.

Q. Who furnished them to you?

A. Mr. Hawley of Hawley and Puckett.

Q. Hawley and Puckett, the law firm of this city?

A. Yes, sir.

(Testimony of William Finney.)

Q. After receiving these papers from Hawley and Puckett did anyone appear as the representative of the Flato Commission Company?

A. Yes, sir, Mr. Hicks.

Q. Did you take possession of the sheep as requested? A. I did.

Q. Who was in company with you when you took possession of them?

A. Mr. Hicks, the agent of the Flato Commission Company.

Q. Did you proceed to sell these sheep and foreclose the chattel mortgage, as requested by Mr. Hawley?

A. I did.

Q. You may state if that is the record of your proceedings in that matter (handing witness paper.)

A. Yes, sir.

By Mr. BORAH.—We now offer in evidence certified copy of the record in the foreclosure proceedings referred to by the witness, certified to by the clerk of the court of Blaine County.

(By Mr. NEAL.)

Q. Was there a notice accompanied this affidavit at the time you received it? A. Yes, sir.

Q. Who signed it—whose signature appeared on the notice? A. To sell them?

Q. Yes, directing you to sell?

A. Why, Hawley and Puckett's.

Q. Where is that notice? Have you it now?

(Testimony of William Finney.)

A. No, sir.

Q. It was a notice directing you to sell?

A. Yes, sir.

Q. Signed by Hawley & Puckett as attorneys for the Flato Commission Company? A. Yes, sir.

Q. It was directing you to sell in compliance with the mortgage and affidavit?

A. Sell 2,600 sheep, yes—branded "G."

Q. Under the mortgage for which the affidavit had been made? A. Yes, sir.

Q. And of which this is a copy of the affidavit?

A. Yes, sir.

Fifty-one—Federal transcript

Q. And you were required by that notice to take possession under the affidavit? A. Yes, sir.

Q. And you did take possession under the notice given you and affidavit? A. Yes, sir.

By Mr. NEAL.—We have no objection to the offer.

(Same is admitted in evidence and marked Plaintiff's Exhibit "D.")

(By Mr. BORAH.)

Q. This notice is the notice which accompanied the affidavit and which is signed by the counsel for the Flato Commission Company? A. Yes, sir.

Q. And directed you formally to proceed in accordance with the statute to foreclose this mortgage?

A. Yes, sir.

Q. Now, you say Mr. Hicks accompanied you as the agent of the Flato Commission Company?

(Testimony of William Finney.)

A. Yes, sir.

Q. In taking possession of the sheep?

A. Yes, sir.

Q. What did you afterwards do with the sheep? Did you make sale of them? A. I did.

Q. Who was present, if anyone, representing the Flato Commission Company at the time of the sale?

A. Mr. Hicks.

Q. As the agent of whom?

A. As the agent of the Flato Commission Company.

Q. You were furnished a bond, were you, at the same time that you commenced this foreclosure proceeding?

A. Yes, sir.

Q. Who sent you the bond?

A. Mr. Hicks, the agent of the Flato Commission company.

Q. You may state if that is the original document. (Handing witness paper.) A. It is.

By Mr. BORAH.—We offer in evidence the original indemnity bond.

By Mr. NEAL.—To which the defendants and each of them object for the reason that the bond is not a bond authorized by the statutes, and the execution of such a bond is contrary to the policy of the law of the State of Idaho, and the bond being void, cannot be a foundation for liability and for the further reason that it is incompetent, irrelevant and immaterial.

By the COURT.—The objection is overruled.

(Testimony of William Finney.)

By Mr. NEAL.—Exception.

(Same is admitted in evidence and marked Plaintiff's Exhibit "E.")

Q. After you took possession of those sheep was a suit commenced against you by Ralph Cowden for these same sheep? A. Yes, sir.

Q. Were the papers served upon you by the proper officer? A. Yes, sir.

Q. To whom did you transmit these papers or deliver them after they were served upon you? The summons and copy of the complaint?

A. Hawley & Puckett.

Q. As whose attorneys?

A. The Flato Commission Company's.

Q. Did you employ them in your capacity as Sheriff or individually to protect your interests?

A. No, sir.

Q. Who employed them? A. Mr. Hicks.

Q. Who drew the answer for you in that case?

A. Hawley and Puckett.

Q. Do you know Judge Van Dusen?

A. I don't know him; I saw him at Caldwell.

Q. Did he appear there as one of the counsel in the trial of that case?

A. He appeared there as counsel for the Flato Commission Company; yes, sir.

Q. Did you have anything to do with the employment of any of the counsel who represented you, or the defendant, in the case of Cowden versus Finney?

(Testimony of William Finney.)

A. No, sir.

Q. Did you have anything to do with the directing of the proceedings? A. Nothing whatever.

Q. As I understand, then, the entire proceeding, after the suit was brought was in the hands of the counsel for the Flato Commission Company?

A. Yes, sir.

Q. Was an appeal taken in that case?

A. Yes, sir.

Q. Did you have any knowledge of it at the time it was taken?

A. I did not; not right at the time.

By Mr. BORAH.—I will ask to introduce in evidence the remittitur.

By Mr. NEAL.—To which the defendants and each of them object for the reason that there was not any privity between the parties to this action, and that as to the American Bonding Company there was no notice, such as is contemplated by the law, given; and for those reasons the American Bonding Company is not and was not bound by that judgment, and the offer of the evidence is incompetent, irrelevant and immaterial.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

Q. Has this judgment against you in the case of Cowden versus Finney, or any part of it, been paid or satisfied? A. It has not.

(Testimony of William Finney.)

Q. It still stands as a judgment against you?

A. Yes, sir.

Cross-examination.

(By Mr. NEAL.)

Q. You had some conversation with Mr. Hicks first, I believe? A. Yes, sir.

Q. About when was that, Mr. Finney? I mean with reference to when you made the levy?

A. It was about two weeks before I made the levy; he was in the office there at Hailey.

Q. He told you at that time what he wanted?

A. No, not at that time; he said he might want to foreclose the mortgage at that time.

Q. Did he tell you what sheep it was on?

A. Yes, sir.

Q. Did he tell you who gave the mortgage?

A. Yes, sir.

A. No, he did not locate them at that time; at that time when he was there was the time company was claiming the sheep.

Q. The same band of sheep that you afterwards levied on for the Flato Commission Company?

A. Yes, sir; the same sheep; that is, he claimed they were the same sheep.

Q. The same band that you levied on for the Flato Commission Company? A. Yes, sir.

Q. And, at a later time you received these papers from Hawley & Puckett? A. Yes, sir.

(Testimony of William Finney.)

Q. What circumstances led up to Hawley & Puckett sending you these papers? Did you have any talk with them about that?

A. No, sir. I got a telephone from Mr. Hicks and he wanted to know what bond I would ask to foreclose on 2,400 sheep, more or less. I asked him how many more, and he said there might not be only a few more, and I told him I would want a $10,000 bond.

Q. He had been at your place before that and you told him you would not levy on them without a bond?

A. No, sir; nothing at all was said about a bond.

Q. That is the only conversation you had about a bond?

A. That was all the conversation—was over the telephone two or three weeks after he had been in the office.

Q. Did you have any talk with Mr. Hawley?

A. No, sir.

Q. None whatever? A. No, sir.

Q. Did you have any talk with Mr. Hawley over the telephone on or about July 22, 1902, in which conversation Mr. Hawley told you that he wanted you to be ready to go out and make a levy on these sheep on the morning of July 24, and that George Hicks would be there to go with you? Did you or did you not?

A. Well, now, I think that came by letter. I am not positive. He said Hicks would accompany me, yes.

Q. Did you, in the course of the same conversation, say to Mr. Hawley, "I will do nothing looking to levying

(Testimony of William Finney.)

and taking possession of those sheep on the foreclosure of the Flato Commission Company mortgage until I have been indemnified?''

A. No, sir, there was nothing said about it at all.

Q. Nothing whatever?

A. No, sir. That is, Mr. Hawley had not said anything to me about it at all.

Q. Is it not the case that you refused to levy until you had a bond?

A. No, the bond was offered me before ever they asked me to take possession of those sheep.

Q. The only offer and the only talk in the matter of a bond was had between you and Hicks then, was it?

A. Yes, sir.

Q. And if Mr. Hicks says it was between you and Mr. Hawley, he is mistaken about it, is he?

A. Well, Mr. Hawley may possibly have said something about a bond, but I don't remember now of him saying anything about a bond at all; but Mr. Hicks is the one I made the bargain with about what the bond should be—the amount.

Q. You are absolutely positive that you did not refuse to levy without a bond?

A. Why, no, I did not. I possibly would if they had not offered be any--but they offered it.

Q. Were there any letters passed between you and Mr. Hawley prior to the time you received the papers?

A. Yes, there was a letter or two—I don't remember now—in regard to the sheep.

(Testimony of William Finney.)

Q. You don't remember the contents of it?

A. No, sir, not exactly; to take possession of the sheep, and that Mr. Hicks would accompany me and show me what sheep they were. That was the sum and substance of it.

Q. Did you reply to this letter?

A. I think I did.

Q. What did you tell him in reply?

A. I just merely answered the letter—that I would do so; I don't know—I couldn't tell just word for word what was in the letter now.

Q. You think you demanded the bond, then, in your letters?

A. Why, no. The bond was there before ever they asked me to take possession of the sheep.

Q. What did you do with the notice that you have received along with the mortgage? The notice signed by Hawley & Puckett?

A. Why, I think that was put with the other papers in the recorder's office. I think it was put along up with the mortgage.

Q. That is your custom to do that, is it?

A. Why, yes.

Q. You have no knowledge of where it is now?

A. I have not.

Redirect Examination.

(By Mr. BORAH.)

Q. As I understand, Mr. Finney, when you had your

(Testimony of William Finney.)

first conversation with Mr. Hicks, that was some weeks or ten days before they asked you to take possession of the sheep?

A. Yes, sir; it must have been two weeks before, when he was there in the office.

Q. And afterwards you had a communication with him over the phone, in which he asked you what bond you would ask to foreclose these sheep — about 2,600 head? A. Yes, sir.

Q. And following that conversation these papers for foreclosure and the bond were sent you?

A. They were sent to me, yes, sir.

Witness excused.

RALPH COWDEN, duly called, sworn and examined, testifies as follows:

Direct Examination.

(By Mr. BORAH.)

Q. Mr. Cowden, you are the plaintiff in the case of Cowden versus Finney, tried in the District Court of Canyon County? A. Yes, sir.

Q. In which you recovered a judgment for some $9,500? A. Yes, sir.

Q. Has that judgment or any part of it been paid or satisfied? A. No, sir.

Q. It is still due and owing to you, is it?

A. Yes, sir.

Witness excused.

Plaintiff rests.

(Testimony of Ralph Cowden.)

By Mr. MORRISON.—The defendants, and each of them, demur to the evidence adduced, for the reason that it does not establish or tend to establish facts sufficient to constitute a cause of action against the defendants or either of them. It shows:

1st. That the bond upon which the action was brought was extorted "colore officii" and therefore void "ab initio."

2d. That said bond was demanded and given in a case where the sheriff was fully protected by a process fair upon its face, and one which it was his duty under the law to execute.

3d. That there was a failure of any notice to the American Bonding Company sufficient to make the alleged judgment recovered against the plaintiff binding against said company.

4th. That the bond upon which this action was brought was not taken in a case in which the sheriff was authorized by statute or by any law to demand a bond, and the taking was contrary to the policy of the law.

5th. That there was a failure of any notice to the Flato Commission Company sufficient to make the alleged judgment recovered against the plaintiff binding against said company.

By the COURT.—The demurrer is overruled.

By Mr. MORRISON.—Exception.

(Testimony of Ralph Cowden.)

By Mr. NEAL.—The defendants offer in evidence the depositions of John R. Bronson, O. W. Eaton, the deposition of James C. Dahlman, and the deposition of George W. Hawkes.

By Mr. BORAH.—These depositions are exactly as were in the Mills case. They are repeated almost word for word. The objections are the same and reduced to writing and upon file, and we will rely upon those same objections.

By the COURT.—The objection to the offer of the depositions is sustained.

By Mr. NEAL.—Exception.

By Mr. NEAL.—We offer to prove by the depositions just offered and also by the oral evidence of J. C. Dressler and Ed Paine the following: First, that Ralph Cowden is not the owner of the sheep in controversy and that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed. Second, that whatever interest Ralph Cowden had or acquired in the sheep in controversy was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw. Third, that the judgment in the case of Cowden versus Finney was excessive, and does not measure the true value of the sheep for the taking of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not in excess of $6,500, and that that amount is the total

(Testimony of Ralph Cowden.)

amount of damage of all sorts caused in the premises, if any.

This offer to apply to each of these defendants.

By Mr. BORAH.—We object to this testimony as offered for the reason that the judgment in the case of Cowden vs. Finney is conclusive upon all the questions to which the evidence offered relates; and that that judgment is conclusive and binding upon the defendants in this case, and is incompetent, irrelevant and immaterial.

By the COURT.—The objection is sustained.

By Mr. NEAL.—Exception.

By Mr. NEAL.—We offer the depositions of Ed H. Reid and George W. Hawkes to the point that the bond was extorted.

By Mr. BORAH.—We have our objections in writing to this the same as in the other case, and we rely upon those objections.

By the COURT.—The objection is sustained.

Mr. NEAL.—Exception.

Defendant rests.

By the COURT.—Judgment is ordered, Mr. Clerk, in each case in accordance with the prayer of the complaint.

By Mr. MORRISON.—We would like the record to

(Testimony of Ralph Cowden.)

show an exception to the findings of fact and conclusions of law.

By the COURT.—You can have exceptions entered when the findings of facts and conclusions of law are filed; your exceptions will go with them. It is understood the time of preparation of the bill of exceptions will begin to run from the time the findings of facts are filed.

Case closed.

State of Idaho,
County of Ada,—ss.

I hereby certify that the above and foregoing transcript is a true, correct and complete copy of the oral evidence in the above-entitled case taken by me as stenographer in said case.

A. M. BRANNIN.

[Endorsed]: Testimony. Filed Nov. 28th, 1905. A. L. Richardson, Clerk.

Plaintiff's Exhibit "D."

Sheriff's Office,
County of Blaine.

I, William Finney, Sheriff of the County of Blaine, do hereby certify that I received the within and hereunto annexed copy of Chattel Mortgage with copy of affidavit on the 23d day of July, 1902, and personally served the

same on the 24th day of July, 1902, by delivering to and leaving with Newton Parks, agent of R. L. Shaw, a copy of mortgage and affidavit, and notice of sale, and informing the said agent, Newton Parks, of the contents thereof, and I further certify that on the 24th day of July, 1902, I took possession of a portion of the property described in the said mortgage, to wit, 2,600 head of wethers more or less, branded $\widehat{G}$ and after due and legal notice by posting notices of sale in three public places in the precinct where said property was sold, and also by publishing notices in the News Miner, a daily paper published in Hailey, Blaine Co., Idaho, for the period of eight days, and I further certify that on the 2d day of Aug., 1902, at 2 o'clock P. M. near where Trail Creek empties into little Smoky in Blaine County Idaho, the time and place fixed for said sale, I did attend and offered for sale the above described wethers, 2,629, singly, and the same were bought by Mr. George A. Hawkes, agent for the Flato Commission Co. for ($2.27) Two Dollars and twenty-seven cents per head, or a total amount of $5,967.83, Five thousand nine hundred and sixty-seven and 83-100 dollars, said amount being the highest and best bid for the same, and I further certify that after deducting the amount of $173.54 sheriff's costs and expenses and $336.70, herders lien, the balance amounting to the sum of $5,457.59 was credited on the mortgage and I hereby return this mortgage partially satisfied to the amount of $5,457.59.

W. FINNEY,
Sheriff.

Hailey, Idaho, August 4th, 1902.

State of Idaho,
County of Ada,—ss.

George A. Hawkes, being first duly sworn, deposes and says: That he is the agent and representative of the Flato Commission Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska; that on the 30th day of November, 1901, at South Omaha, in the State of Nebraska, one R. L. Shaw made and delivered to said corporation, the Flato Commission Company, his certain promissory note dated of that day, by the terms of which he agreed to pay to said corporation or its order on the first day of June, 1902, the sum of ten thousand ($10,000.00) dollars, with interest thereon from maturity at the rate of eight (8%) per cent per annum; and also at the said time and place, made and delivered his certain other promissory note, dated on that day, by the terms of which he promises to pay to said corporation or its order the further sum of eight thousand six hundred and twenty-six and 55-100 ($8,626.55) dollars, with interest there from maturity at the rate of eight per cent (8%) per annum; and that on the said 30th day of November, 1901, for the purpose of securing the payment of said promissory notes, and each and both of them, said R. L. Shaw, made, executed and delivered to said corporation, the Flato Commission Company, his certain mortgage on the following described livestock and chattels, to wit:

Thirty-five hundred (3500) head of yearling wethers and wool.

Thirty-five hundred (3500) head of ewes, their increase and wool.

Three thousand (3,000) head of mixed lambs and wool.

All of said above-named sheep and lambs being marked with black paint $\overset{\frown}{G}$. Also two hundred (200) head of native two year old steers branded P. or T. on left hip.

And affiant further says that the date of maturity of said notes and each of them is long past, but that no part of the sum mentioned in said notes, or either of them, or any interest thereon, has been paid; and that there is now due to said corporation, the Flato Commission Company, from said R. L. Shaw on said chattel mortgage the sum of eighteen thousand six hundred and twenty-six and 55-100 ($18,626.55) dollars, with interest thereon at the rate of eight per cent per annum from the 31st day of May, 1902.

GEORGE A. HAWKES.

Subscribed and sworn to before me this 22d day of July, 1902.

[Seal] G. G. ADAMS,
Notary Public.

And you will further take notice that I will sell a portion of the above-described property, to wit, 2,600 head of wethers, more or less, near where Trail Creek empties into Little Smoky, in Blaine Co., Idaho. Sale to take place at 2 o'clock P. M.

W. FINNEY,
Sheriff.

CHATTEL MORTGAGE.

Know all men by these presents: That R. L. Shaw, mortgagor, residing at Boise City, in the County of Ada, and State of Idaho, in consideration of the sum of eighteen thousand six hundred twenty-six and 55-100 dollars, in hand paid by the Flato Commission Company (Inc.), the receipt whereof is hereby acknowledged, have assigned and sold, and by these presents do grant and convey unto the said the Flato Commission Company, and its successors and assigns, the following livestock and chattels, to wit:

3,500 head of yearling wethers and wool.

3,500 head of ewes, their increase and wool.

3,000 head of mixed lambs and wool.

All above-named sheep and lambs are marked G with black paint.

200 head of native 2 year old steers, branded P or T on left hip, now on full feed, and to be kept on feed until marketed.

Value of security, $36,000.00.

Said above enumeration and description being intended to cover and include not only all the said property owned by said mortgagor as aforesaid, but all additions and accretions thereto and especially included and covered hereby. The livestock above-described may have other brands or marks than those mentioned above, but those given are the holding marks or brands, and carry the title thereto.

It it hereby covenanted and stated as a fact, that all of said livestock and chattels are owned by said mortgagor,

and are free and clear of all liens, and encumbrances of every kind and character; and all of said sheep are now in the possession of said mortgagor and are located in Ada County, Idaho, 12 to 15 miles south of Boise City. Cattle are located in Lemhi County, Idaho, near the town of Junction.

Said property is all the property owned by said mortgagor in said location and having the above description.

To have and to hold the said livestock and chattels unto the said the Flato Commission Company, and its successors and assigns forever; and the said mortgagor covenants to and with the said Flato Commission Company, that he will forever warrant and defend the title and possession of the said livestock and chattel against each and every person whomsoever.

It is provided, however, that the said livestock and chattels shall remain in the possession of said mortgagor herein, and fed by the mortgagor during the term of this mortgage, subject to the conditions and stipulations hereinafter set forth and expressed; but the mortgagor shall have no right to remove the same, or any part thereof, from the place where they are now located, excepting as may be herein provided, or to otherwise dispose of, or encumber said property without the written permission of the holder of the note or notes hereinafter mentioned, and at least three days before the maturity of said note or notes the above-described livestock shall be shipped and consigned to the Flato Commission Company, at Union Stock Yards, South Omaha, Neb., Union Stock Yards, Chicago, Ill., Kansas City Stock Yards, Kansas

City, Mo., or South St. Joseph, Mo., and sold by it on commission in the usual and customary way, and out of the proceeds it shall pay itself the hereinafter mentioned indebtedness.

This instrument is intended for the better securing of the Flato Commission Company, in the payment of the sum of $18,626.55 evidenced by the mortgagor promissory note described in substance as follows:

Description of Note.

Date 1901.	Maturity 1902.	In favor of.	Where payable.	Rate of Interest.	Amount.
Nov. 30	June 1	The Flato Com. Co.	So. Omaha, Neb.	8 %	Mty. 10,000.00
"	"	"	"	"	8,626.55

Together with any renewals or extentions of said note or notes or either of them, and the interest thereon, and such future advances as may be made by the said The Flato Commission Company, to the said mortgagor.

Upon the payment of said promissory note or notes with interest thereon accrued, together with the expenses incurred in executing the provisions of this mortgage being well and truly made, then this instrument is to become void.

Should any of the conditions of this instrument be broken or violated then at the option of the Flato Commission Company, or the holder of said note or notes, the above-described indebtedness may become due and payable instanter; or upon failure to pay said note or notes, or either of them at maturity, the whole of the above-described indebtedness shall become due and payable.

In case the mortgagor shall fail to keep any of the agreements herein, or if any of the statements made herein shall prove false in whole or in part; or in case said livestock shall not thrive in possesion of the mortgagor, or if the Flato Commission Company, or the holder of said note or notes, should fear diminution in numbers or in the value of said property, or feel unsafe or insecure with reference to the payment of the sums of money mentioned, then in all or any of the cases aforesaid, the Flato Commission Company, or the holder of said note or notes, shall have the right and power to take immediate possession (personally or by agent, authorized by the possession of the instrument or a copy of the same) of all of said livestock and chattels wherever found, or are supposed to be, without legal process, the possession of these presents or a copy thereof being sufficient authority for any and all such action, and in any of the events above specified, the Flato Commission Company, or the holder of said note or notes, shall have the right, either on or before the maturity of the paper secured by this instrument, to sell said livestock and chattels at public auction, or such part thereof as shall be sufficient to pay the mortgage debt remaining unpaid, whether due or to become due, as the case may be, together with all costs and expenses pertaining to the searching for, taking, keeping, advertising, and selling of said property, and in case the Flato Commission Company or the holder of said note or notes, shall be put to expense for attorneys' fees in the taking, advertising, and selling of said property, or any part thereof, the mortgagor agrees to pay all such expenses incurred

the Flato Commission Company, or the holder of said note or notes, providing they shall not exceed ten per cent of the unpaid mortgage debt, and such fees are hereby secured by this mortgage, and shall be taken out of the proceeds of sale. Said sale shall take place either on the premises where said livestock and chattels are now situated, or may be found, or in South Omaha, Douglas County, Nebraska, or at such other place as may be designated by the Flato Commission Company, or the holder of said note or notes, after giving at least (20) days' notice of such sale by advertisement thereof in some newspaper published in the county where the sale is to take place. All moneys remaining after the satisfaction of the mortgage debt and other expenses shall be paid on demand of the mortgagor, who hereby authorizes the person conducting such sale to adjourn the same from time to time, if in his judgment necessary, until said livestock and chattels (or such part thereof as may be required) shall be sold and to give bills of sale to the purchaser thereof, which shall be conclusive as to the regularity of all proceedings, and convey absolutely all right and title of the mortgagor in and to the said livestock and chattels.

It is agreed and understood that the mortgagor makes the statements contained in this mortgage for the purpose of obtaining the amount of money named herein, and the same is advanced on the faith and credit of such statements.

In witness whereof I have hereunto set my hand and seal this 30th day of Nov., A. D. 1901.

R. L. SHAW. [Seal]

Witness:

W. I. HOOPER.

State of Nebraska,
County of Douglas,—ss.

I hereby certify, that on this 30th day of November, 1901, before me, W. I. Hooper, a notary public, duly commissioned, within and for said county and State, personally appeared R. L. Shaw, personally known to me to be the person and individual described as mortgagor in, and whose name is subscribed to the foregoing mortgage, and stated and acknowledged to me that he signed, sealed, executed and delivered the same for the uses, purposes and consideration therein expressed, mentioned, and set forth, as his free act and deed.

In witness whereof I have hereunto set my hand and notarial seal the day and year last above written.

[Seal] W. I. HOOPER,
Notary Public.

State of Idaho,
County of Ada,—ss.

I, J. H. Wickersham, Ex-officio Recorder in and for Ada County, State of Idaho, do hereby certify that the annexed is a full, true and correct copy of a certain chattel mortgage, No. 1420, from R. L. Shaw to Flato Commission Company as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 23d day of December, A. D. 1901.

J. G. WICKERSHAM,
Ex-officio Recorder.

[Endorsed]: Copy No. 1420. Chattel Mortgage. From R. L. Shaw, Boise City, Idaho, or Dillon, Mont., to Flato Commission Company. Filed for record on the 13th day of January, A. D. 1902, at 10 o'clock 5 minutes A. M., page 528. J. P. Clough, Recorder, Lemhi County, Idaho. Filed Aug. 2, 1902, W. E. Heard, Clerk.

State of Idaho,
County of Blaine,—ss.

I, George A. McLeod, County Recorder in and for Blaine County, Idaho, hereby certify that a copy of the annexed mortgage as set out herein, duly certified, was filed for record in this office on July 23, 1902, at 4:50 o'clock P. M., and remains on file herein.

Witness my hand and official seal this 2d day of Feb., 1905.

[Seal] GEO. A. McLEOD,
County Recorder.

State of Idaho,
County of Blaine,—ss.

I, George A. McLeod, Clerk of the District Court of the Fourth Judicial District of Idaho, in and for Blaine County, Idaho, hereby certify that the foregoing are full, true and correct copies of all papers filed in my office, in the matter of the foreclosure of the chattel mortgage

therein set forth, from R. L. Shaw to Flato Commission Company, to wit: Return of sheriff, copy of affidavit, copy of chattel mortgage, as shown by the original thereof, on file in my office.

Witness my hand and the seal of said Court this 2d day of Feb., 1905.

[Seal] GEO. A. McLEOD,
Clerk.

[Endorsed]: Plaintiff's Exhibit "B." Filed in evidence June 3, 1905.

Plaintiff's Exhibit "F."

In the Supreme Court of the State of Idaho, December Term, A. D. 1903.

RALPH COWDEN,
Plaintiff and Respondent,
vs.
WILLIAM FINNEY, Sheriff,
Defendant and Appellant.

On an Appeal from the District Court, of the Third Judicial District, in and for Canyon County.

Judgment.

This cause having been heretofore heard, submitted and taken under advisement by the Court, and the Court having fully considered the same, now on this day the

cause was again called, and the decision of the Court delivered by Justice Ailshie, to the effect that the judgment and the order denying a new trial by the Court below be affirmed:

It is therefore considered, adjudged and decreed by the Court that the judgment and the order refusing a new trial of the District Court of the Third Judicial District in and for the County of Canyon, in the above-entitled cause, be, and the same hereby is affirmed, costs are awarded to the respondent.

I, Sol Hasbrouck, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 13 day of February, A. D. 1904, and now remaining of record in my office.

Witness my hand and seal of the Court affixed at my office this 13 day of Feb., A. D. 1904.

[Seal] SOL HASBROUCK,
Clerk.

[Endorsed]: Plaintiff's Exhibit "F." Filed in evidence June 3, 1905.

the State of Idaho, in and for Canyon County, and for the further reason that said judgment is conclusive and binding upon the defendants in this case.

2. Plaintiff objects to the testimony of John R. Bonson as given in his deposition for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that all matters and things covered by said testimony were and are determined by the judgment in the case of Ralph Cowden vs. William Finney, in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, and for the further reason that said judgment is conclusive and binding upon the defendants in this case.

3. Objects to the answer of the following question "Did you have any correspondence with Gowan during the year 1902, or did you see any correspondence from him with reference to having any sheep to sell," for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the ownership of said sheep had been litigated and determined by the judgment in the case of Cowden vs. Finney above referred to.

4. Objects to the answer of the following questions, "What sort of sheep did he say in the letter he had to sell," for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the ownership of said sheep has been litigated and determined in the case of Cowden vs. Finney above referred to.

5. Objects to all of the testimony of said John R. Bon-

son wherein he attempts to relate the conversation with J. B. Gowan upon pages 7, 8, 9, 10, 11, 12, 13,14, 15,16, 17, 18, 19, 20, 21, 22, 23, 24 of said deposition, for the reason that the same is incompetent, irrelevant and immaterial, and is concerning and touching a matter that was litigated and determined in the case of Cowden vs. Finney above referred to, and for the further reason that the judgment in the case of Cowden vs. Finney is conclusive in all matters concerning which said testimony is given and is conclusive as to the amount which the plaintiff in this case may recover, and as to who the owner of the sheep in question was.

6. Plaintiff objects to the testimony of O. W. Eaton relative to the conversation with Gowan or Cowden related in his testimony on pages 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, for the reason that the same is incompetent, irrelevant and immaterial and is concerning and touching a matter that was litigated and determined in the case of Cowden vs. Finney above referred to, and for the further reason that the judgment in the case of Cowden vs. Finney is conclusive in all matters concerning which said testimony is given, and is conclusive as to the amount which the plaintiff in this case may recover and as to who the owner of the sheep in question was.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 250. Objections to the Testimony in the Depositions of O. W. Eaton and John R. Bonson. Filed June 2d, 1905. A. L. Richardson, Clerk. W. E. Borah, Attorney for Plaintiff.

(Title and Caption Omitted.)

Objections to Testimony in the Deposition of James C. Dahlman.

Comes now the plaintiff and makes the following objections to the testimony of James C. Dahlman in said Dahlman's deposition, to wit:

1. Plaintiff objects to all of the testimony of evidence of said James C. Dahlman for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the matter of the value of the sheep in question has been fixed and determined by the judgment in the case of Ralph Cowden vs. William Finney in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, and that the judgment in said case is conclusive and binding upon the defendants in this case.

2. Objects to the answer to the following question upon page 3 of said deposition, "What would be the value of wethers one and two year old in the State of Idaho, having reference to the price at which they would sell upon the market as at Omaha, St. Joe or Kansas City," for the reason that the same is irrelevant, incompetent and immaterial, and for the further reason that the judgment in the case of Finney vs. Cowden in the District Court of Third Judicial District of the State of Idaho, in and for Canyon County, is conclusive upon these defendants and has established the value of said sheep and the amount which the plaintiff in this case is entitled to recover.

3. Objects to all the testimony thereafter given by said witness as to the price or value of the sheep covered by the suit in the case of Finney vs. Cowden in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, for the reason that in this case it is incompetent, irrelevant and immaterial, that the judgment in said cause of Finney vs. Cowden is conclusive and binding upon these defendants and has established the value of the said sheep and the amount which the plaintiff is entitled to recover in this case.

4. Objects to the testimony of said witness showing the amount realized from the sale of the sheep in question for the reason that the same is incompetent, irrelevant and immaterial and is not binding upon this plaintiff and does not constitute a measure of damages in this case and is not the proper method of establishing the liability of the defendants.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 250. Objections to Testimony in the Depositions of James C. Dahlman. Filed June 2d, 1905. A. L. Richardson, Clerk. W. E. Borah, Attorney for Plaintiff.

(Title and Caption Omitted.)

Objections to Deposition of George A. Hawkes.

Comes now the plaintiff, and objects to the deposition of George A. Hawkes and all of the testimony of said

Hawkes in said deposition for the reason that the same is incompetent, irrelevant and immaterial, and does not prove or tend to prove any of the issues in this case and for the further reason that the matter to which said testimony in said deposition relates was involved in the case of Cowden vs. the above-named plaintiff in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, and that the judgment in said case is conclusive upon said matter and binding upon these defendants, and they cannot relitigate or retry said matters.

Plaintiff specially objects to that portion of the testimony of said George A. Hawkes wherein it is attempted to show the value of the sheep in question for the reason that the same question was involved in the case of Cowden vs. Finney aforesaid, and the evidence was incompetent, irrelevant and immaterial, said judgment in said case being conclusive and binding upon these defendants.

Plaintiff objects to that portion of the testimony of George A. Hawkes upon page 4 of the deposition and contained in his second answer upon said page for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the judgment in the case aforesaid is binding and conclusive upon these defendants.

Plaintiff further objects to the testimony of said Hawkes in his third and last answer upon page four and continued to page five for the reason that the same is incompetent, irrelevant and immaterial, and for the

further reason that the judgment in the case aforesaid is binding and conclusive upon these defendants.

Plaintiff further objects to the last three answers of said Hawkes for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the judgment in the case aforesaid is binding and conclusive upon these defendants.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 250. Objections to Deposition of George A. Hawkes. Filed June 2d, 1905. A. L. Richardson, Clerk. W. E. Borah, Attorney for Plaintiff.

District of Idaho,
County of Ada,—ss.

In the Circuit Court of the United States for the District of Idaho, Ninth Circuit, Central Division, District of Idaho.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Plaintiff,
vs.
AMERICAN BONDING COMPANY OF BALTIMORE, and THE FLATO COMMISSION COMPANY,
Defendants.

Notice to Take Deposition of George A. Hawkes.

To William Finney and W. E. Borah, his Attorney:

The above-named plaintiff will take notice that on

Saturday, the 27th day of May, 1905, the defendants and each of them will take the deposition of George A. Hawkes, a witness to be used as evidence on the trial of the above-entitled cause, at the law office of James D. Pardee, Attorney at Law, Eagle Block in the city of Sale Lake, County of Salt Lake, and State of Utah, between the hours of 9 A. M. and 6 P. M. of said day, and the taking of said depositions will be adjourned from day to day (Sundays and legal holidays excepted) between the same hours until they are completed.

MORRISON & PENCE and
NEAL & KINYON,
Attorneys for all Defendants.

Received copy of the above notice this 29th day of April, 1905, and consent is given that said depositions may be taken at the time and place in said notice specified. Subject to all objections, as to competency, relevancy and materiality.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 250. Notice to Take Depositions. Filed June 3d, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and The FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Findings and Decision of Court.

This cause came on regularly for trial upon the 3d day of June, 1905, at a regular term of the above-named court. A jury having been expressly waived in writing and entered upon the minutes of the court, the case was tried before the court without a jury, F. J. Smith and W. E. Borah appearing as attorneys for the plaintiff and Morrison & Pence and Neal & Kinyon as attorneys for the defendants, and from the evidence introduced, the court finds the facts as follows, to wit:

1. That upon the 22d day of July, 1902, the defendant, the Flato Commission Company, made an affidavit for the foreclosure of a chattel mortgage upon certain sheep described in said affidavit, and delivered said affidavit together with the proper order and notice to foreclose said chattel mortgage as required by the statutes of the State of Idaho, to the plaintiff herein, William Finney, Sheriff of Blaine County, Idaho.

2. That at the time of delivering said affidavit of foreclosure and notice as aforesaid, the Flato Commission Company as principal and the other defendant, the American Bonding Company of Baltimore as surety, made, executed and delivered to said plaintiff, then sheriff of Blaine County, Idaho, a certain bond of indemnity, a copy of which is attached to the complaint herein and which said bond of indemnity is introduced in evidence herein as Plaintiff's Exhibit "E."

3. That said sheriff in company with one Hawkes, agent of the Flato Commission Company, took possession of certain sheep under and by authority of said chattel mortgage, advertised the same for sale and the same were sold to the defendant herein, the Flato Commission Company, all of which more fully appears by the sheriff's return in said foreclosure proceedings as shown by exhibit "D" introduced in evidence herein.

4. That one Ralph Cowden made claim to be the owner of the sheep taken into possession of said sheriff under and by virtue of said foreclosure proceedings and sold as aforesaid, and thereafter on the 31st day of July, 1902, commenced an action in the District Court of the

Fourth Judicial District of the State of Idaho, in and for Blaine County, against the plaintiff herein, William Finney, for the recovery of possession of said sheep or the value thereof. That said action was removed to Canyon County, Idaho, for trial, and that trial was thereafter had and such proceedings as resulted in a judgment in favor of the plaintiff therein, one Ralph Cowden against William Finney, late sheriff of Blaine County, the above-named plaintiff, for the sum of $8,798.24 principal and interest, and for $250 costs, said judgment bearing date June 17, 1903, all of which proceedings are more fully set forth and disclosed by the judgment-roll introduced in evidence herein as Exhibit "A."

5. That thereafter such proceedings were had in the case of Ralph Cowden vs. William Finney, sheriff of Blaine County, that an appeal was taken to the Supreme Court of the State of Idaho, and that thereafter such further proceedings were had as are more particularly shown by the remittitur in said cause which is introduced in evidence herein as Plaintiff's Exhibit "F."

6. That counsel who appeared for the sheriff in the cause above named, Ralph Cowden vs. William Finney, sheriff, were not employed by the said William Finney, but that the counsel of the defendant, the Flato Commission Company, as such, had charge of the defense in said cause and of the appeal in said cause.

7. That the sheep which were taken possession of by said William Finney and sold under foreclosure proceedings as aforesaid was the same property which was in-

volved in the litigation and for which Ralph Cowden secured judgment against William Finney as aforesaid.

8. That no part of said judgment in the case of Ralph Cowden vs. William Finney, sheriff as aforesaid, has been paid or satisfied, and that the same now stands a judgment against said William Finney, sheriff.

9. That by the name by which said bond was signed, to wit, The American Bonding and Trust Company of Baltimore City, is the same company or corporation as the American Bonding Company of Baltimore, said name having been changed as shown by its articles of incorporation on file with the Secretary of State of the State of Idaho by act of the legislature from the name of The American Bonding and Trust Company of Baltimore City to the American Bonding Company of Baltimore.

10. That the amount now due upon said judgment in the case of Ralph Cowden vs. William Finney aforesaid and for which said William Finney, late sheriff of Blaine County, is liable is $10,290.36.

As a conclusion of law from the foregoing facts, the court finds that the plaintiff is entitled to a judgment against the defendants and each of them for the sum of $10,290.36, lawful money of the United States, and costs of this suit, and it is ordered that judgment be entered accordingly.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 250. Findings. Filed June 5th, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Judgment by the Court.

This cause came on regularly for trial upon the 3d day of June, 1905, at a regular term of the above-named court. A jury having been expressly waived in writing and entered upon the minutes of the Court, the cause was tried before the Court without a jury, F. J. Smith and W. E. Borah appearing as counsel for plaintiff, and Morrison & Pence and Neal & Kinyon as counsel for the defendants.

Whereupon witnesses were duly sworn and examined and documentary evidence introduced and the evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation thereon the Court files its findings and decision in writ-

ing and orders that judgment be entered herein in favor of the plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid it is ordered, adjudged and decreed that the plaintiff, William Finney, late sheriff of Blaine County, do have and recover of and from the American Bonding Company of Baltimore, a corporation and the Flato Commission Company, a corporation the sum of $10,290.36, with interest thereon at the rate of seven per cent per annum from date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of $57.00.

Done in open court.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 250. Judgment. Filed June 5, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Notice of Motion for New Trial.

To William Finney, Late Sheriff of Blaine County, Idaho, Plaintiff, and W. E. Borah and Frank J. Smith, his Attorneys of Record.

You will please notice that defendants, the American Bonding Company of Baltimore and Flato Commission Company and each of them intends to move the Court to grant a new trial of said cause, upon the foliowlng grounds, to wit:

I.

Irregularity in the proceedings of the Court, in that the Court ordered a trial in this cause and tried the same, after the adjournment of the regular March, A. D.—

In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

For correct copy hereof, see p. 252 of Transcript.

Notice.

To the Flato Commission Company (a Corporation), and to Messrs. Neal and Kinyon and Messers. Morrison & Pence, its Attorneys:

You will please take notice that the undersigned, the American Bonding Company of Baltimore (a Corporation), desires, and is about, to prosecute proceedings in the above-entitled action, in the matter of a writ of error herein, for a review by the Circuit Court of Appeals of the United States, in and for the Ninth Circuit, of the proceedings heretofore had herein, and desires, and is about to do and perform each and every necessary act

or thing whatsoever, in and about the prosecution of such proceedings.

And you are hereby notified to appear in the matter of such proceedings, and to join therein if you so desire.

Dated August 26th, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,

By JESSE W. LILIENTHAL,
Vice-President.

[Endorsed]: No. 250. Notice. Filed Sept. 8th, 1905. A. L. Richardson, Clerk.

(Title and Caption Omitted.)

For correct copy, see p. 254 of this Transcript.

Notice of Intention, etc.

To the Flato Commission Company (a corporation), and to Messrs. Neal & Kinyon and Messrs. Morrison & Pence, its Attorneys:

You will please take notice that the undersigned, the American Bonding Company of Baltimore (a corporation), desires, and is about to, prosecute proceedings in the above-entitled action in the matter of a writ of error herein for a review by the Circuit Court of Appeals of the United States in and for the Ninth Circuit, of the proceedings heretofore had herein, and desires, and is about to do and perform each and every necessary act or thing whatsoever in and about the prosecution of such proceedings.

And you are hereby notified to appear in the matter of such proceedings, and to join therein, if you so desire.

Dated, August 26th, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,

By JESSE W. LILIENTHAL,
Vice-President.

State of Nebraska,
County of Douglas,—ss.

Joseph R. Wells, of lawful age, being duly sworn, makes oath, and says: That he served the within notice upon the Flato Commission Company, by delivering a true copy thereof to its Secretary, James C. Dahlman, in South Omaha, Nebraska, on the 2d day of October, 1905.

JOSEPH R. WELLS.

Subscribed in my presence and sworn to before me this 2d day of October, 1905.

[Seal] GEO. L. WHITMORE,
Notary Public.

[Endorsed]: No. 250. Notice of Intention, etc. Filed Oct. 14th, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff,

vs.

THE AMERICAN BONDING COMPANY OF BALTIMORE (a Corporation) et al.,

Defendants.

Objections to Proposed Bill of Exceptions.

Comes now the plaintiff and objects to the settlement or allowance of the proposed bill of exceptions heretofore filed in the above-entitled cause, and for ground of said objections says:

1st.

Said bill of exceptions was not presented, served or filed during the term of the Court at which the said action was tried and a judgment entered.

2d.

That said bill of exceptions was not served or filed within any time prescribed by law, or by the order of this Court, or by any stipulation or agreement between counsel.

3d.

That said bill of exceptions was not served and filed until more than three months after the adjournment of the term of Court sine die, at which said case was tried and judgment entered, and for more than three months

after the time extended for making and filing said bill of exceptions.

4th.

That said bill of exceptions was not filed and served until after the appeal in this case was taken, and until after said six months had elapsed from the entry of judgment in the above cause.

W. E. BORAH,
Attorney for Plaintiff, Boise, Idaho.

[Endorsed]: No. 250. Circuit Court U. S., Ninth Circuit, Central Division. William Finney, Plaintiff, vs. American Bonding Co. of Baltimore et al., Defendants. Objections to Proposed Bill of Exceptions. Attorney for Plaintiff, W. E. Borah. Filed Dec. 12th, 1905. A. L. Richardson, Clerk.

Objections sustained.

BEATTY.

In the Circuit Court of the United States, Ninth Circuit, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff,

vs.

THE AMERICAN BONDING COMPANY OF BALTIMORE (a Corporation) et al.,

Defendants.

Affidavit in Support of Objections to Proposed Bill of Exceptions.

State of Idaho,
County of Ada,—ss.

W. E. Borah, being duly sworn, deposes and says: That he is and has been from the commencement of the litigation, one of the attorneys for the above-named plaintiff, and as such attorney is familiar with the facts herein stated, and has also taken the precaution to review the record as to dates, before making this affidavit. Affiant states that the judgment in the above-entitled cause was signed, made and entered of record June 5, 1905; that the defendants had taken a stipulation for sixty days, in which to serve and file a bill of exceptions, but that no order of the Court was ever made upon said stipulation; that said stipulation provided that the sixty days should run from notice of entry of judgment; that notice was given of the entry of judgment to the attorneys for defendants June 5, 1905; that upon June 24,

1905, after entry of said judgment, defendants' attorneys served notice in writing of a motion for a new trial; that on June 15, 1905, attorney for plaintiff served written notice for the settlement of the cost bill; that thereafter the above stipulation referred to, with reference to serving and filing a bill of exceptions, was extended by stipulation until August 19, 1905, but that no order was ever made at any time by the Court; that the time for serving and filing a bill of exceptions was never extended, by stipulation or otherwise, in any manner at all, after the 19th day of August, 1905, and that the time for defendants to serve and file a bill of exceptions expired August 19, 1905, that the term of court at which the judgment in the above-entitled cause was rendered, adjourned sine die August 17, 1905; that upon December 2, 1905, the defendants filed a petition for writ of error, the assignments of error, the order allowing appeal and the bond on appeal; that upon December 4, 1905, they filed a purported bill of exceptions with the clerk of the Court; that no service of said bill of exceptions upon counsel for plaintiff was made until December 11, 1905, that said purported bill of exceptions was filed and served more than three months after the adjournment of the above term of court sine die, and after the time for filing the same as extended by the stipulation aforesaid, and that the same was filed without any authority of the Court, or without any stipulation, or order permitting or allowing the same.

And further affiant saith not.

W. E. BORAH.

Subscribed and sworn to before me this 12th day of December, 1905.

[Seal] JOHN J. BLAKE,
Notary Public.

[Endorsed]: No. 250. Affidavit in Support of Objections to Proposed Bill of Exceptions. Filed Dec. 12th, 1905. A. L. Richardson, Clerk. Attorney for Plaintiff, W. E. Borah.

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Monday, the 18th day of Dec., 1905. Present: JAS. H. BEATTY, Judge.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Plaintiff,
vs.
AMERICAN BONDING COMPANY, OF BALTIMORE et al.,
Defendants.
No. 250.

Order Refusing to Settle Bill of Exceptions.

On this day was announced the decision of the Court upon the plaintiff's objection to the settlement of defendants' proposed bill of exceptions herein, heretofore argued and submitted, ordered that said objections be and the same are hereby sustained. To which ruling the defendant American Bonding Company excepted in due form of law.

Transcript of Judgment.

JUDGMENT DOCKET, DISTRICT COURT, CANYON COUNTY, IDAHO.

Judgment Debtor: William Finney, Sheriff Blaine County, Idaho.

Judgment Creditor: Ralph Cowden. Amount: $8,798.-24. June 20, 1903, book 2, page 121. Appeal when taken, Oct. 28, 1903. Costs, $250.60. Supreme Court costs, $77.05.

Remittitur filed, March, 1904. Judgment and order denying a new trial by District Court affirmed. Costs awarded to respondent.

RALPH COWDEN,
Plaintiff,
vs.
WILLIAM FINNEY, Sheriff, Blaine County, Idaho,
Defendants.

Office of the Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for Canyon County,—ss.

I, clerk of said court, do hereby certify that the above and foregoing is a full, true and correct transcript of the original judgment docket in the above-entitled action, of said District Court in and for Canyon County, State of Idaho.

Attest my hand and the seal of said court this 19th day of December, 1905.

[Seal of District Court] JOHN A. TUCKER,
Clerk.

Filed December 19th, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Plaintiff,
vs.
AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,
Defendants.

Petition for Writ of Error.

Now comes the defendant, American Bonding Company of Baltimore, herein, and says that on the 5th day of June, 1905, judgment was entered herein in favor of plaintiff and against this defendant, for the sum of ten thousand two hundred and ninety and 36-100 dol-

lars and costs of action, and that in the said judgment and the proceedings had prior thereto, in this cause, certain errors were committed to the prejudice of this defendant, all of which will appear in detail from the assignment of errors herein.

Wherefore said defendant prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that the transcript of the records, and the papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

And your petitioner will ever pray.

Dated December 2d, 1905.

NEAL & KINYON,
MORRISON & PENCE,
JESSE W. LILIENTHAL,
Attorneys for said Defendants.

[Endorsed]: No. 250. Petition for Writ of Error. Filed Dec. 2d, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit for District of Idaho, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Assignment of Errors.

The defendant, the American Bonding Company of Baltimore, in this action, in connection with its petition for a writ of error herein, makes the following assignments of error which it avers occurred:

I.

The Court erred as to said defendant, in overruling the demurrer of said defendant to plaintiff's complaint herein.

II.

The Court erred as to said defendant, in ordering judgment to be entered in favor of the plaintiff and against said defendant for the sum of ten thousand two hundred and ninety and 36-100 dollars and the costs of this action

and in ordering judgment in any amount whatever, against said defendant.

III.

The Court erred as to said defendant, in entering judgment in favor of plaintiff herein, against said defendant.

IV.

The Court erred as to said defendant, in overruling the objection by said defendant to the admission of any evidence herein, upon the ground that the complaint herein does not state facts sufficient to constitute a cause of action against this defendant.

V.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the judgment-roll offered in evidence during the examination of the witness Tucker, the full substance whereof is as follows:

Said judgment-roll consists of the proceedings in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County in an action wherein Ralph Cowden was plaintiff and William Finney as sheriff of Blaine County, Idaho, was defendant, and consists:

(1) Of complaint praying for the possession of certain sheep alleged to have been converted by said defendant as such sheriff, or for the value thereof, and for damages and costs;

(2) Of demurrer to such complaint;

(3) Of answer to such complaint, wherein defendant justified the taking of said property and the sale thereof

under and by virtue of certain proceedings for the foreclosure of a chattel mortgage embracing said property, given by one R. L. Shaw, to secure the payment to the Flato Commission Company of the sum therein mentioned, together with interest and costs.

That said proceedings were commenced under the provisions or secs. 3391 to 3398, inclusive, of Title 12, Chap. 4, of the Revised Statutes of Idaho, and are based on an affidavit and notice given by George W. Hawkes as the Agent of said Flato Commission Company.

That said property was in said proceeding sold to said George W. Hawkes, for $5,967.83.

(4) Of findings of fact and conclusions of law in said action.

(5) Of judgment by said court in favor of plaintiff, and against defendant for the possession of the property therein referred to, or in case return could not be had, then for judgment for the sum of $8,281.35, together with $516.89 interest, and $750.00 costs.

VI.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the entry from the judgment docket during the examination of the witness Tucker, the full substance whereof is as follows:

"Judgment Debtor, William Finney, Sheriff Blaine County, Idaho. Judgment Creditor, Ralph Cowden. Amount of Judgment, $8,798.24. Costs, $250.00. Time of Entry, June 20, 1903. Page of Judgment-Book, book 2, page 121.

VII.

The Court erred as to said defendant, in overruling said defendant's objection to the question, "It still stands as a live judgment upon the records of your office?" asked of the witness Tucker.

VIII.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the papers marked Plaintiff's Exhibit "E" offered in evidence during the examination of the witness, William Finney, whereof the full substance is as set forth in Exhibit "A" attached to the complaint herein.

IX.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the remittitur from the Supreme Court during the examination of the witness William Finney, which in full substance was a remittitur from the Supreme Court of the State of Idaho, accouncing the affirmance of the judgment and order denying a new trial in the case of Cowden vs. Finney, already referred to.

X.

The Court erred as to said defendant, in overruling said defendant's demurrer to the evidence.

XI.

The Court erred as to said defendant, in sustaining plaintiff's objection to the admission in evidence of the deposition of John R. Bonson, the full substance whereof was to the effect, first, that at the time of the alleged sale

to Ralph Cowden, plaintiff in the action hereinbefore referred to, he had full knowledge and notice of the existence of the prior mortgage by R. L. Shaw to the Flato Commission Company, of the sheep alleged to have been converted by said Finney as such sheriff; second, that the value of the sheep so alleged to have been converted was an amount smaller than that found by the District Court, of the Fourth Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. William Finney, Sheriff, etc., defendant, in Assignment No. V hereinbefore referred to.

XII.

The Court erred as to said defendant, in sustaining plaintiff's objection to the admission in evidence of the deposition of O. W. Eaton, the full substance whereof was to the effect, first, that at the time of the alleged sale to Ralph Cowden, plaintiff in the action hereinbefore referred to, he had full knowledge and notice of the existence of the prior mortgage by R. L. Shaw, to the Flato Commission Company of the sheep, alleged to have been converted by said Finney as such sheriff; second, that the value of the sheep so alleged to have been converted was an amount smaller than that found by the District Court of the Fourth Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. William Finney, sheriff, etc., defendant, in Assignment No. V hereinbefore referred to.

XIII.

The Court erred as to said defendant, in sustaining plaintiff's objection to the admission in evidence of the

deposition of James C. Dahlman as to the value of sheep therein referred to, the full substance of which said evidence so rejected was to the effect that the value of the sheep alleged to have been converted was an amount smaller than that found by the District Court of the Fourth Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. William Finney, Sheriff, etc., defendant, in Assignment No. V hereinbefore referred to.

XIV.

The Court erred as to said defendant, in sustaining plaintiff's objection to the admission in evidence of the deposition of George W. Hawkes, the full substance of which was to the effect that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Finney as sheriff, and that said bond was without consideration, and void.

XV.

The Court erred as to said defendant, in sustaining plaintiff's objection to said defendant's offer to prove by the testimony of J. C. Dressler that said Ralph Cowden was not the owner of the sheep in controversy, and that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed; and that whatever interest Ralph Cowden had or acquired in the sheep in controversy, was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw; that the judgment in the case of Cowden vs. Finney was excessive, and does not measure the true value of the sheep, for the tak-

ing of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not in excess of $6,500.00, and that that amount is the total amount of damage of all sorts caused in the premises, if any.

XVI.

The Court erred as to said defendant, in sustaining plaintiff's objection to said defendant's offer to prove by the testimony of Ed Paine, first, that said Ralph Cowden was not the owner of the sheep in controversy; second, that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed; third, that whatever interest Ralph Cowden had or acquired in the sheep in controversy, was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw; fourth, that the judgment in the case of Cowden vs. Finney was excessive, and does not measure the true value of the sheep for the taking of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not in excess of $6,500.00, and that that amount is the total amount of damage of all sorts caused in the premises, if any.

XVII.

The Court erred as to said defendant, in sustaining plaintiff's objection to the offer of said defendant to prove by the deposition of Ed. H. Reid, that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Finney as sheriff, and that said bond was without consideration and void.

XVIII.

The Court erred as to said defendant, in sustaining plaintiff's objection to the admission in evidence of the deposition of George W. Hawkes, the full substance of which was to the effect that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Finney as sheriff, and that said bond was without consideration, and void.

NEAL & KINYON,
MORRISON & PENCE,
JESSE W. LILIENTHAL,
Attorneys for said Defendants.

[Endorsed]: Filed Dec. 2, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Idaho, Central Division.

At a stated term of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the District of Idaho, Central Division, held at its courtroom in the City of Boise, State of Idaho, on the 2d day of December, one thousand nine hundred and five. Present: The Honorable J. H. BEATTY, District Judge, District of Idaho, designated to hold and holding said Circuit Court.

AT LAW.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

No. 250.

Order for Filing Bond.

The defendant, American Bonding Company of Baltimore, a corporation, having this day filed its petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which said defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having this day been duly allowed;

Now, therefore, it is ordered, that upon the said defendant, American Bonding Company of Baltimore, filing with the clerk of this court a good and sufficient bond in the sum of eleven thousand ($11,000.00) dollars, to the effect, that if the said defendant, American Bonding Company of Baltimore, and plaintiff in error, shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation is to be void, else to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings in this court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated, Dec. 2d, 1905.

JAS. H. BEATTY,
Judge.

[Endorsed]: Order for Filing Bond. Filed Dec. 2d, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Idaho, Central Division.

At a stated term of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the District of Idaho, Central Division, held at its courtroom in the City of Boise, State of Idaho, on the 2d day of December, one thousand nine hundred

and five. Present: The Honorable J. H. BEATTY, District Judge, District of Idaho, designated to hold and holding said Circuit Court.

AT LAW.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and FLATO COMMISSION COMPANY, a Corporation, Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

No. 250.

Order Allowing Writ of Error.

Upon motion of Messrs. Neal & Kinyon, Messrs. Morrison & Pence, and Jesse W. Lilienthal, Esqr., attorneys for defendant, the American Bonding Company of Baltimore, and upon filing a petition or a writ of error and an assignment of errors, it is

Ordered that a writ of error be, and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the judgment heretofore entered herein, and the other matters and things in said petition and assignment set forth, and

that the amount of the bond on said writ of error be, and hereby is, fixed at eleven thousand dollars ($11,000.00).

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 250. Order Allowing Writ of Error. Filed Dec. 2d, 1905. A. L. Richardson, Clerk.

Bond on Writ of Error.

Know all men by these presents: That we, American Bonding Company of Baltimore, a corporation, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto William Finney in the full and just sum of eleven thousand dollars to be paid to, the said William Finney, his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this second day of December, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Circuit Court of the United States, for the Central Division, District of Idaho, in a suit depending in said court, between said William Finney, plaintiff and said American Bonding Company of Baltimore and others, defendants, and numbered 250 on the register of said court, a judgment was rendered against the said American Bonding Company of Balti-

more and the said American Bonding Company of Baltimore, having obtained from said Court a writ of error to reverse the said judgment in the aforesaid suit, and a citation directed to the said William Finney citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

Now, the condition of the above obligation is such, that if the said American Bonding Company of Baltimore shall prosecute the writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

AMERICAN BONDING COMPANY OF BALTIMORE, [Seal]

By NEAL & KINYON,
Its Attorneys,

FIDELITY DEPOSIT COMPANY OF MARYLAND, [Seal]
Surety.

By SHERMAN G. KING,
Its Attorney in Fact.

Acknowledged before me the day and year first above written:

State of Idaho,
County of Ada,—ss.

On this 2d day of Dec., 1905, before me, Walter S. Walker, a notary public in and for said county, personally appeared Sherman G. King, known to me to be

the person whose name is subscribed to the within instrument, as the attorney in fact of the Fidelity and Deposit Company of Maryland, and acknowledged to me that he subscribed the name of Fidelity and Depositing Company of Maryland thereto as principal, and his own name as attorney in fact.

In testimony whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate above written.

WALTER S. WALKER,
Notary Public.

[Endorsed]: No. 250. Bond on Writ of Error. Form of Bond and Sufficiency of Surety Approved. Jas. H. Beatty, Judge. Filed Dec. 2d, 1905. A. L. Richardson, Clerk.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, District of Idaho, Central Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between American Bonding Company of Baltimore, a corporation, plaintiff in error, and William Finney, defendant in error, a manifest error hath happened, to the great dam-

age of the said American Bonding Company of Baltimore, a corporation, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 30th day of December, 1905, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and five.

[Seal] A. L. RICHARDSON,
Clerk of the Circuit Court of the United States, for the Ninth Circuit, District of Idaho, Central Division.

Allowed by:

JAS. H. BEATTY,
Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 2d day of December, 1905.

Without waiver of any rights in the premises.

W. E. BORAH,
Attorney for Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of Idaho, Central Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 250. Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division. American Bonding Company of Baltimore, a Corporation, Plaintiff in Error, vs. William Finney, Late Sheriff of Blaine County, Idaho, Defendant in Error. Writ of Error. Filed Dec. 2d, 1905. A. L. Richardson, Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to William Finney, Late Sheriff of Blaine County, Idaho, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein the American Bonding Company of Baltimore, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. H. BEATTY, United States District Judge for the District of Idaho, Central Division, this 2d day of December, A. D. 1905.

JAS. H. BEATTY,
United States District Judge.

Service of within citation, by copy, admitted this 2d day of December, A. D. 1905.

Without waiver of any rights in premises.

W. E. BORAH,
Attorney for Defendant in Error.

[Endorsed]: No. 250. In the Circuit Court of the United States for the Ninth Circuit, District of Idaho, Central Division. American Bonding Company of Baltimore, a Corporation, Plaintiff in Error, vs. William Finney, Late Sheriff of Blaine County, Idaho, Defendant in Error. Citation. Filed Dec. 2d, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Plaintiff,
vs.
AMERICAN BONDING COMPANY OF BALTIMORE et al.,
Defendants.

Clerk's Certificate to Transcript.

I, A. L. Richardson, clerk of the Circuit Court of the United States, for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 205, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, except the proposed bill of exceptions, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs of the record herein, amounting to the sum of $127.30, has been paid by the appellants.

Witness my hand and the seal of said Court affixed at Boise, Idaho, this 26th day of January, A. D. 1906.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1320. United States Circuit Court of Appeals for the Ninth Circuit. American Bonding Company of Baltimore, a Corporation, Plaintiff in Error, vs. William Finney, Late Sheriff of Blaine County, Idaho, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Filed March 31, 1906.

F. D. MONCKTON,
Clerk.

In the Circuit Court of the United States, Ninth Circuit for District of Idaho, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Notice.

To the Flato Commission Company (a Corporation), and to Messrs. Neal & Kinyon and Messrs. Morrison & Pence, Its Attorneys:

You will please take notice that the undersigned, the American Bonding Company of Baltimore (a Corporation), desires, and is about to, prosecute proceedings in the above-entitled action, in the matter of a writ of error herein, for a review by the Circuit Court of Appeals of the United States, in and for the Ninth Circuit, of the proceedings heretofore had herein, and desires, and is about to do and perform each and every necessary act or thing whatsoever, in and about the prosecution of such proceedings.

And you are hereby notified to appear in the matter of such proceedings, and to join therein, if you so desire.

Dated August 26, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,

By JESSE W. LILIENTHAL,
Vice-President.

Due service of the within notice by copy is admitted this 30th day of August, 1905.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Flato Commission Company, a Corporation.

[Endorsed]: No. 250. In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division. William Finney, Late Sheriff of Blaine County, Idaho, Plaintiff, vs. American Bonding Company of Baltimore, a Corporation, etc., et al., Defendants. Notice. Filed Sept. 8, 1905. A. L. Richardson, Clerk.

UNITED STATES OF AMERICA.

District of Idaho,—ss.

I, A. L. Richardson, clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of notice in case No. 250, Wm. Finney, Late Sheriff of Blaine Co., Idaho, vs. American Bonding Co., a Corporation etc., et al., has been by me compared with the original, and that it is a correct transcript

therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have set my hand and affixed the seal of said Court in said District, this 7th day of March, 1906.

[Seal] A. L. RICHARDSON,
Clerk.

In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Plaintiff,
vs.
AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,
Defendants.

Notice of Intention, etc.

To the Flato Commission Company (a Corporation), and to Messrs. Neal & Kinyon and Messrs. Morrison & Pence, Its Attorneys:

You will please take notice that the undersigned, the

American Bonding Company of Baltimore (a Corporation), desires, and is about to, prosecute proceedings in the above-entitled action, in the matter of a writ of error herein, for a review by the Circuit Court of Appeals of the United States, in and for the Ninth Circuit, of the proceedings heretofore had herein, and desires, and is about to do and perform each and every necessary act or thing whatsoever, in and about the prosecution of such proceedings.

And you are hereby notified to appear in the matter of such proceedings, and to join therein, if you so desire.

Dated August 26, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,

By JESSE W. LILIENTHAL,
Vice-President.

State of Nebraska,
County of Douglas,—ss.

Joseph R. Wells, of lawful age, being duly sworn, makes oath and says that he served the within notice upon the Flato Commission Company, by delivering a true copy thereof to its secretary, James C. Dahlman, in South Omaha, Nebraska, on the 2d day of October, 1905.

JOSEPH R. WELLS.

Subscribed in my presence and sworn to before me this 2d day of October, 1905.

[Seal] GEO. L. WHITMORE,
Notary Public.

Due service of the within notice, by copy, is admitted this 2d day of October, 1905.

————————,
Secretary of Flato Commission Co.

[Endorsed]: No. 250. In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division. William Finney, Late Sheriff of Blaine County, Idaho, Plaintiff, vs. American Bonding Company of Baltimore a Corporation, etc., et al., Defendants. Notice of Intention, etc. Filed Oct. 14, 1905. A. L. Richardson, Clerk.

UNITED STATES OF AMERICA.

District of Idaho,—ss.

I, A. L. Richardson, clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of notice of intention, etc., in case No. 250, Wm. Finney, Late Sheriff of Blaine Co., Idaho, vs. American Bonding Co., a Corporation, etc., et al., has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have set my hand and affixed the seal of said Court in said District, this 7th day of March, 1906.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1320. United States Circuit Court of Appeals, for the Ninth Circuit. American Bonding Company of Baltimore etc. vs. William Finney, Late Sheriff of Blaine County, Idaho. Certified Copies of Notices to Appear, etc.

Filed March 31, 1906.

F. D. MONCKTON,
Clerk.

5

Nos. 1320-1321

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation,
Plaintiff in Error,
vs.
WILLIAM FINNEY, late Sheriff of Blaine County, Idaho,
Defendant in Error.
} No. 1320.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation,
Plaintiff in Error,
vs.
J. C. MILLS, Jr., late Sheriff of Boise County, Idaho,
Defendant in Error.
} No. 1321.

POINTS OF PLAINTIFF IN ERROR.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Plaintiff in Error.

JESSE W. LILIENTHAL,
Of Counsel for Plaintiff in Error.

Filed this.....day of August, A. D. 1906.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Nos. 1320-1321

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, *Plaintiff in Error,* vs. WILLIAM FINNEY, late Sheriff of Blaine County, Idaho, *Defendant in Error.*	No. 1320.
AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, *Plaintiff in Error,* vs. J. C. MILLS, Jr., late Sheriff of Boise County, Idaho, *Defendant in Error.*	No. 1321.

POINTS OF PLAINTIFF IN ERROR.

STATEMENT.

Both of these cases come before this Court upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division. They

involve precisely the same questions of law and fact, and therefore (the permission of this Court having been first obtained) the points involved are presented in only one Brief. References will be made only to the Transcript in the Finney case (No. 1320), for the sake of brevity.

Each of the actions was brought by a Sheriff upon a bond of indemnity given to him by the Plaintiff in Error as surety, and copy of which bond is annexed to the complaint (pg. 21). The bond was demanded by the Sheriff upon the foreclosure of a chattel mortgage held by the principal of said bond, the Flato Commission Company, and ran directly in favor of the Defendant in Error as Sheriff. The bond recited that, "Whereas un- " der and by virtue of an affidavit on the foreclos- " ure of a chattel mortgage given by one R. L. Shaw " to the above named Flato Commission Company, " and the notice required by the Statutes of Idaho " for the foreclosure of chattel mortgages, directed " and delivered to the said William Finney, Sheriff " of Blaine County, the said Sheriff was directed " to take into his possession the said mortgaged " property, and to sell the same, and the said " Sheriff did thereupon take into his possession the " following described property, to wit: (describing " the same); and whereas upon the taking of said " sheep, other persons or person claimed the said " property as their own; and whereas the said " Flato Commission Company, notwithstanding said " claim, requires the said William Finney, Sheriff,

" that he shall retain said property in his posses-
" sion, and sell the same"; and thereupon follows the condition of the bond.

In the complaint (pg. 16), it is stated that, "On
" or about the 24th day of July, 1902, the above
" named plaintiff, as Sheriff of Blaine County, at
" the instance and request of the above named de-
" fendant, the Flato Commission Company, and
" upon affidavit and notice *duly filed as required by*
" *the Statutes of the State of Idaho* relative to the
" foreclosure of a chattel mortgage, took posses-
" sion of certain personal property (describing the
" same) * * * ; that *after* the said plaintiff
" had taken possession of said sheep at the instance
" and request of the Flato Commission Company,
" the said sheep and all of them were claimed by
" Ralph Cowden as his separate and individual
" property. That in order that the said plaintiff
" might hold said sheep, retain possession of the
" same, and make sale thereof, to satisfy the mort-
" gage of the Flato Commission Company under
" which the same had been taken, and *upon demand*
" and at the request of this plaintiff, the said Flato
" Commission Company and the said American
" Bonding Company of Baltimore made and exe-
" cuted and delivered to the plaintiff, their certain
" bond of indemnity; * * * that upon the execu-
" tion and delivery of said bond of indemnity *and*
" *in consideration of giving the same,* the said
" plaintiff retained possession of said sheep, and
" sold the same at the instance and request, and

" under the authority and advice of, the said Flato " Commission Company and the American Bonding " Company."

It is then alleged that judgment was obtained by said Cowden against the Defendant in Error, *"and " that said judgment remains unsatisfied and un- " paid".*

To this Complaint the Plaintiff in Error demurred (pg. 93), upon the ground that it did not state facts sufficient to constitute a cause of action. Said demurrer was overruled (pg. 96), and such overruling is assigned as error (pg. 1). Upon the trial of the action, Plaintiff in Error objected to the introduction of any evidence, for the reason that the complaint failed to state facts sufficient to constitute a cause of action (pg. 173).

It is contended by Plaintiff in Error that the judgment should be reversed, upon the ground that the demurrer to the complaint should have been sustained.

First, because the bond exacted *colore officii,* was in violation of the Idaho Statute requiring the Sheriff to proceed upon the mere notice and affidavit and without bond, was therefore given under duress, was without consideration, and void.

Secondly, that the bond having been exacted and given as one of indemnity, and containing no covenant to pay in the event that the plaintiff incurred liability, the Sheriff in default of an allegation that he had paid the judgment, had brought the action prematurely.

I.

POINTS.

The Bond Sued Upon Was Exacted Colore Officii, and Was Therefore Void Ab Initio.

The Revised Statutes of Idaho (Sec. 1871) provide under the title, "Duties of Sheriffs", that "The "Sheriff * * * *must* serve all process and "notices in the manner prescribed by law."

The same Statutes, Sec. 1882, provide that, "A "Sheriff or other ministerial officer is justified in "the execution of, and *must* execute all process "and orders regular on their face and issued by "competent authority, whatever may be the defect "in the proceedings upon which they are issued."

The same Statutes in the following sections indicate the scheme provided for the protection of the Sheriff. In the Chapter of the Code of Civil Procedure, Sec. 3540, treating of executions, it is enacted that if the Sheriff levies an execution upon property which is thereafter claimed by third persons, he may summon a Sheriff's jury to try the validity of the claim. Only in the case that the jury finds for the claimant, may the Sheriff demand a bond of indemnity, and if the bond be not given, he may release his levy. (Revised Stats., Sec. 4478.)

In the Chapter on Attachments (Sec. 3306) (Revised Stats., Sec. 4314), it is provided that the Sheriff may similarly protect himself by trial of Sheriff's jury.

In the Chapter relating to Claim and Delivery (Sec. 3281) (Revised Stats., Sec. 4281), it is provided that,

> "If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto or right to possession thereof, * * * and serve the same upon the Sheriff, the Sheriff is not bound to keep the property or deliver it to the plaintiff unless the plaintiff on demand indemnify the Sheriff against such claim."

In the Chapter (Sec. 2830) relating to Chattel Mortgages, it is provided that,

> "The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court *by any person interested* in so doing, *for which purpose an injunction may issue if necessary.*"
>
> Revised Stats., Sec. 3396.

And again (Sec. 2824),

> "Any mortgage of personal property, when the debt to secure which the mortgage was given is due, may be foreclosed by notice and sale as hereinafter provided, or it may be foreclosed by action in the District Court having jurisdiction in the County in which the property is situated."

By Sec. 2827 it is provided that when this affidavit and notice are placed in the hands of the Sheriff,

> "the officer *must* take the property into his possession and give notice of sale in the same manner and for the same length of time as is required in cases of sale of like property on

execution, and the same *must* be conducted in the same manner."

Revised Stats., Sec. 3393.

By Sec. 2829 (Revised Stats., Sec. 3395), it is provided that,

> "The officer must make return upon the affidavit hereinbefore mentioned, of all his proceedings, and must transmit the same * * * to the Clerk of the District Court * * * and the Clerk must file such return in his office."

We, therefore, have here a complete statutory scheme for the foreclosure of chattel mortgages in Idaho, which scheme has been declared by the Courts of that State as exclusive.

> Rein v. Calloway, 7 Ida. 633; 65 Pac. Rep. 63.

Any mortgagee may require the proper Sheriff to sell the mortgaged property, by furnishing the affidavit and notice mentioned in the Revised Statutes (Sec. 3391); and thereupon

> "The officer *must* take the property into his possession and give notice of sale in the same manner and for the same length of time as is required in cases of sale of like property on execution, and the same *must* be conducted in the same manner".

The Complaint states expressly that the Sheriff took possession of the mortgaged property "upon " affidavit and notice *duly filed, as required by the " Statutes of the State of Idaho* relative to the " foreclosure of a chattel mortgage"; that there-

after upon claim being made to the property by a third person, "upon demand of the plaintiff" the bond sued upon was furnished. The bond itself recites that the affidavit and notice required by the Statutes of Idaho were furnished.

These provisions of the Statute have been definitely construed by the Supreme Court of Idaho in

> Blumauer etc. Co. v. Branstetter, 43 Pac. Rep. 575.

In that case the affidavit and notice having been served upon the Sheriff, and the goods having been levied upon but not yet sold, the goods were attached, and the Sheriff having proceeded with the sale under the mortgage, was held liable by the trial Court to the attaching creditor. The Supreme Court, in reversing the judgment, said:

> "It is apparent that the affidavit and notice are as effectual in the sale of property mortgaged and in the collection of the debt, in every respect as an execution. * * * Where these papers are placed in the hands of the Sheriff, and they are fair upon their face, he must proceed to execute them in the manner pointed out in the Statute. *The law requires it, and the Sheriff has no alternative.* It is in fact and in law, a writ of execution in its proceeding, and for a neglect or refusal to execute which he would be liable to the creditors, as pointed out in Sec. 1875, Revised Stats. And the converse is true. It is process in the execution of which the Sheriff is protected. * * We must not lose sight of the fact that process fair upon its face must be executed by the Sheriff upon its being placed in his hands. We hold the affidavit and notice to be process.

> No objection is made by the respondent to the form of the process. Therefore, the Sheriff must execute it. The Sheriff cannot be called upon when he receives an execution, to sit in judgment upon the validity of the judgment. Neither can he in this case be called upon to sit in judgment on the validity of the mortgage. * * But the attaching creditor is not without abundant and easy remedy. Section 3396 is: 'The right of the mortgagee to foreclose as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, for which purpose an injunction may issue if necessary.'"

The remedy for the mortgagor or "any person interested in so doing", in the case of an attempted abuse of the process of the Court, is pointed out by the Statute. The sale must be arrested by an injunction. The demand of the bond was in direct violation of the Statute, which says that when the affidavit and notice are placed in the hands of the Sheriff, he *must* take the property into his possession, and *must* give notice of the sale, and *must* conduct the same in the same manner as is provided for sales on execution. To give this language its broadest meaning, would be to say that he shall have the same right as in the case of sales on execution, viz., where claim is made by third persons, to summon a Sheriff's jury, and if the claim is sustained by that jury, to demand a bond of indemnity as a condition of proceeding with the sale.

The notice and affidavit were regular on their face. The complaint itself so states: "Duly filed

as required by the Statutes". The bond could not then be lawfully "demanded". The Sheriff was bound without it to proceed to sale, unless enjoined. As said by the Supreme Court:

> "The law requires it and the Sheriff has no alternative".

It is expressly provided in the Statute, that in execution and attachment cases, the Sheriff may protect himself against the claims of third persons, by Sheriff's jury; in replevin cases, by bond of indemnity. Industriously, however, the Statute withholds said rights in the foreclosure of chattel mortgages, "The Sheriff has no alternative".

AUTHORITIES.

It is undoubtedly true that some cases are to be found in the books of bonds voluntarily given, and not contravening any express Statute, which have been enforced, although not expressly authorized. But in these cases there is no element of extortion by color of office, and they are not bonds running in favor of public officers, but generally bonds given by public officers for the faithful performance of their official duties; an exception, in other words, grafted upon the law for the benefit of the public as a whole. It will be found that in none of these excepted cases were the bonds required by an officer as a condition of performing duties to the public which by law he was required to perform without exacting the bond.

The cases representing the general rule contended for may be subdivided into the following classes:

(a) Bonds not required by law, but *voluntarily* given to indemnify the official.

(b) Bonds which by their terms were more onerous than the Statute or the order of Court.

(c) Bonds *demanded* by an official without authority of law.

(d) Bonds voluntarily given pursuant to unconstitutional Statute.

(a) *Voluntary bonds, for which there is no express legal authority.*

U. S. v. Hudson, 65 Fed. Rep., page 68.

Where no Statute of the United States is broad enough to authorize bail after conviction, a bond given even pursuant to the rule of the United States Supreme Court is void, and is not binding on either principal or sureties.

Parker, Judge:

> "The question is further put whether or not a bond taken under such circumstances would not be good anyhow. Most certainly not. The authorities are uniform on that subject. Bonds to secure the appearance of a person charged with crime must be taken and executed in pursuance of the order of the proper court or officer'. U. S. v. Goldstein's Sureties, 1 Dill. 413, Fed. Cas. No. 15,226. In U. S. v. Horton, 2 Dill. 94, Fed. Cas. No. 15,393, Judge Dillon says: 'It is settled that bonds are valid only when taken in pursuance of law and the

order of a competent court.' It is said by the Court in the case of State v. Buffum, 2 Fost. (N. H.) 267, when speaking of the liability of sureties on bail bonds: 'They are liable in any case only upon the ground that they enter into a recognizance ordered by a tribunal having authority to act in the premises'. 'It is the essence of authority understood by the bail or surety of another that there should have been a valid obligation comprehended.' U. S. v. Hand, 6 McLean, 274, Fed. Cas. No. 15,296. 'Bail taken by a court without jurisdiction, or by an officer without authority is void'. State v. Wininger, 81 Ind. 51; Dickinson v. State (Neb.), 29 N. W. 184; State v. Jones, 3 La. Ann. 10; Gray v. State, 43 Ala. 41; Jacquemine v. State, 48 Miss. 280; Branham v. Com., 2 Bush. 3; Com. v. Roberts, 1 Duv. 199; Com. v. Fisher, 2 Duv. 376; Dugan v. Com., 6 Bush. 305; Harris v. Simpson, 14 Am. Dec. 101; State v. McCoy, 1 Baxt. 111; Wallenweber v. Com., 3 Bush. 68; Williams v. Shelby, 2 Or. 144; Schneider v. Com., 3 Metc. (Ky.) 409; Blevins v. State, 31 Ark. 53; Cooper v. State, 23 Ark. 278; State v. Nelson, 28 Mo. 13; State v. Hays, 4 La. Ann. 59; State v. Vion, 12 La. Ann. 688; Holmes v. State, 44 Tex. 631; State v. Berry, 8 Me. 179; State v. Russell, 24 Tex. 505; Com. v. Loveridge, 11 Mass. 33; Com. v. Otis, 16 Mass. 198; Com. v. Canada, 13 Pick. 86; Powell v. State, 15 Ohio, 579; State v. Clark, 15 Ohio, 595; People v. McKinney, 9 Mich. 444; Then I take it, if I approve the bail bond in this case, it is one which is necessarily invalid, because ordered to be taken without authority. But we hear it said that bail may be taken under the circumstances of this case in the interest of liberty. Nothing is in the interest of liberty that is unauthorized by law".

State v. Murphy, 48 Pac. Rep. (Nev.), page 628.

Where the release of defendant under bail before he has pleaded is unauthorized the bond executed in such case is invalid.

> "It is well settled that bail taken in criminal actions to be valid, must be authorized by law. Dickenson v. State, 20 Neb. 72, 29 N. W. 184; Powell v. State, 15 Ohio St. 579; State v. Clark, Id. 595; Williams v. Shelby, 2 Or. 144; State v. Winninger, 81 Ind. 53; Harris v. Simpson, 14 Am. Dec. 101."

State v. Lagoni, 76 Pac. Rep. (Mont.), 1044.

Though a defendant is released on bail, if the bond was not lawfully required, it cannot be enforced. In this case the Court was without jurisdiction to hold the accused to answer.

County v. Clark, 13 Pac. Rep. (Or.), 511.

A county court *has no authority under the act* regulating proceedings to open roads to require a bond of a petitioner for costs and damages that may be awarded against him in the proceedings, and if exacted it cannot be enforced.

State v. Husey, 9 N. W. Rep. (Ia.), 327.

The warden of the penitentiary *not being required by statute* to give a bond, a bond given by him to the State cannot be enforced. It was claimed that the bond was a valid obligation at common law.

> "In the present case, Husey received nothing by reason of the execution of the bond. No benefit or advantage was conferred on him because of its execution. It must, therefore, be

> regarded as having been *voluntarily executed,* and as there was no consideration therefor it cannot be enforced."

Dugan v. Com., 69 Ky. 305.

A bail bond taken by a clerk who has no statutory authority to take it is void.

Blevins v. State, 31 Ark. 53.

Where a sheriff has no authority to make arrest outside of his own district, a bail bond taken from defendant is void.

State v. Balize, 38 La. Ann. 542.

An appearance bond taken by a sheriff without order of Court admitting defendant to bail is void.

Webber v. Blunt, 19 Wend. 188.

A promise to a sheriff to indemnify him against all damages to which he might be subjected, in consequence of discharging from custody a third person whom he has arrested on legal process is void, although he was induced to grant the discharge upon a false representation of the promisor that the debt, to secure payment of which the process had been issued, had been satisfied.

State v. Sandlin, 44 Ind. 504.

An execution plaintiff is under no obligation to give an indemnity bond to a constable; *he is bound to perform his duty* according to law without such bond.

In the case at bar, says the Idaho Statute, he *must* proceed with the sale.

Vose v. Dean, 7 Mass. 280.

Bail taken by a Court *without authority of law* is void.

Urquhart v. Carvin, 25 La. Ann. 218.

A bond given to a sheriff for release of property provisionally seized is void, nor can he recover for a breach thereof *as a conventional undertaking,* since he has no authority to take such obligation.

Meyer v. Johnson, 28 La. Ann. 244.

Since only a defendant in an attachment can release a property attached by giving bond, no action lies on a bond given by an intervener for a release of the property.

Collins v. Westbury, 2 Bay, 211.

Where to release goods that had been lawfully seized under writ of attachment, the bond sued on was executed, the plea demurred to having set forth that the bond was given at a time when defendant could not wait the slow process of law to obtain redress, the plea was held good on the ground that the bond was given under duress.

Perry v. Hensley, 14 B. Monr. 474.

Where levy is made on property exempt from execution, and a delivery bond is given for its release, the same cannot be enforced.

> "*Although the bond was entered into voluntarily,* yet the necessity for its execution was produced by an illegal act, and therefore its execution may with propriety be said to have been induced by legal coercion. Besides, as the property levied on was not subject to execution,

> the bond is not founded on any consideration either good or valuable. Its execution under the circumstances, cannot be regarded as an implied admission that the property was liable for the debt."

Caffrey v. Dudgeon, 38 Ind. 512.

Action on replevin bond given by defendants in an action brought by them in a court which did not have jurisdiction, but upon which they received the property, which they refused to return.

It was held that although defendants had invoked that jurisdiction, and received the property, the bond given could not be enforced, although, of course, voluntarily given.

Benedict v. Bray, 2 Cal. 251.

If a Justice issue an attachment and take bond in a suit for a sum exceeding his jurisdiction, the proceedings are void, and no action lies on the bond. "A bond exacted by an officer when he has no authority to require it, is void. (Thompson v. Lockwood, 15 Johns. 256.)"

People v. Cabannes, 20 Cal. 525.

A Justice, on conviction, imposed a fine, and in default of same, imprisonment. To perfect an appeal, defendant gave a bond reciting the money judgment, and binding the sureties for its payment. The bond not having been authorized by Statute, its enforcement was refused.

> "In taking the bond, the Justice has exacted a security which the Statute does not require, and such being the case, we are of opinion that no liability resulted from its execution".

Powers v. Crane, 7 Pac. Rep. (Cal.) 135.

In this case it was held (one of the Justices of this Court writing the opinion) that, where an undertaking was given to stay execution, when as a matter of law execution had been stayed by an undertaking previously given, the later undertaking was without consideration and void.

> "As the statute itself wrought the stay, there was no consideration for the sureties' promise."

McCallion v. Hibernia Society, 33 Pac. Rep. (Cal.) 329.

In this case it was held that where a bond in addition to the ordinary appeal bond is given to stay judgment, it is void and no judgment can be entered thereon against the sureties.

(b) *Bonds whose terms are more onerous than the provisions applicable thereto.*

Com. v. Riffe, 49 S. W. Rep. (Ky.) 772.

The Court held that where the accused was required to execute a bond for a sum greater than that fixed in the order admitting him to bail, the bond was void, and cited Cooper v. Com., 13 Bush 654, to the same effect.

Lambert v. Haskell, 22 Pac. Rep. (Cal.) 327.

In this case it was held that to the extent that the injunction bond was broader than required by the statute, it was void.

> "Even if the undertaking had expressly provided for a subsequent liability, if such pro-

> vision be outside of what is required by the statute, it would be void; for it is settled that a statutory undertaking beyond what is required by the statute is to that extent without consideration and inoperative."

Wooters v. Smith, 56 Tex. 198-209.

In this case it was said:

> "A bond given as a condition to be permitted *to enjoy a right clearly given by law, demanded* by an officer who has property in his possession which he has seized under process, ought not to be said to be a voluntary bond, when more onerous than prescribed by statute."

Of course, the argument is stronger that the bond is not voluntary when no bond at all is required by statute.

The right to the sale on the notice and affidavit, admitted by the complaint to have been sufficient, was given by the statute, and the bond having been "demanded" (according to the complaint) it was extorted by color of office, was without consideration and void.

(c) *Bonds demanded by an official without express authority.*

Tully v. Cutler, 82 S. W. Rep. (I. Ty.) 714.

Under the statute providing for an attachment bond to protect the defendant or claimants of the attached property from damage, the sheriff has no right to demand any indemnity beyond the attachment bond as a condition of levying the attachment.

In fact, such bond was demanded and given, and the action was brought on the bond by the custodian, for his fees.

The Court said:

> "There is no provision for an indemnifying bond under the head of attachments in any way. The statute provides for an attachment bond which is ample to protect the defendant in the action against any damage he may suffer, or to protect claimants to the property attached. *If the affidavit be given, it becomes the duty of the sheriff to levy the same without delay,* and the statute further provides for the disposition of such attached property, and the sheriff would have no right to demand any indemnity whatever beyond the attachment bond for any person."

And this was held notwithstanding the provision in the statute that the sheriff, in addition to the bond, might require sufficient money to cover his fees.

U. S. v. Humason, Fed. Cas. 15,421.

Where an officer is required by his superior to give a bond with stipulations in any condition thereof *not required by statute,* the bond is void in toto.

Board v. Harvey, 52 Pac. Rep. (Okl.) 402.

Where the statutes do not either directly or by implication *require* an official to give bond, the bond when exacted is void, even though the board which exacted it is given supervisory control over the officer.

"The following cases hold that a bond voluntarily given for the performance of official duty is valid though no statute requires the bond. * * * The following cases hold such official bond without consideration and void. * * * But there seems to be no difference of opinion upon the proposition that if the unrequired bond is extorted it is void. * * * We cannot assent to the argument that is made that a bond which is required by a board that has no supervision over the officer from whom it is required cannot be viewed as an exacted obligation, but should be considered as one voluntarily given, because the board had no jurisdiction to supervise the action of the officer, or to interfere with his taking possession of the office. A thing required by a body that had no jurisdiction to act in any manner could certainly be no less exacted than if required by a body that had jurisdiction to act, but acted in a manner different from that authorized by law. The claim, then, that the bond was voluntarily given can in no way be upheld, and the case must depend on *whether the law required* the giving of this bond."

It is not pretended that the Idaho statute either required or provided for the bond in issue. We contend, on the contrary, that the statute by implication, forbade the demanding of the bond.

Dunlap v. Vreret, 10 La. Ann. 83.

A sheriff, *though threatened with suit by one claiming property* seized at the instance of the plaintiff in execution, cannot exact from the latter a bond of indemnity.

State v. Koontz, 83 Mo. 323.

A constable cannot, on notice of a claim of *a third person* to property, demand of the plaintiff a bond of indemnity.

Mitchell v. Vance, 5 T. B. Monr. 528.

Property seized under execution and claimed by third person. Sheriff's jury called, but refused to render any verdict. Plaintiff therefore refused to make sale unless given bond of indemnity.

> "These facts prove unquestionably that in refusing to make sale of the property until the bond was executed, the plaintiff *acted in direct violation of the duties of his office.* The jury having failed to render a verdict as to the right of the property, the claimant of the property must necessarily have failed to establish his right, and the Act of Assembly upon that subject imperatively commands the officer by whom the property is executed, to sell the property whenever the claimant fails to establish the property to be his. *The bond must therefore have been* executed for the purpose of *inducing the plaintiff to do that which by the duties of his office was incumbent on him to do,* and as such we apprehend is not binding upon the defendants. * * * Whether or not the present bond would have formed an exception to the rule which makes void, promises to officers for the purpose of inducing them to perform their duty, if for selling the property the plaintiff had been liable to the claimant of the property, is a question not necessary now to be decided, and we shall, therefore, forbear to enter upon its discussion; for the Act of Assembly not only required the plaintiff after the claimant failed to establish the property to be his, to make sale thereof, but it moreover explicitly declares that for selling under such

circumstances, the officer shall not be liable to any suit on account of such sale."

The Supreme Court of Idaho, in the Blumauer case (*supra*) has said the same thing of this sheriff.

> "It is process in the execution of which the sheriff is protected."

Servanti v. Lusk, 43 Cal. 238.

A sheriff on ascertaining that property which had been attached, was exempt, refused to release it without an undertaking. The same was held void for want of consideration, and for having been illegally exacted under color of office.

> "In exacting the undertaking sued upon as a condition on which he would release the property from the attachment, the sheriff exceeded his authority, and violated his duty. So far as the undertaking was founded upon the release of the wagons, it was without consideration and void, inasmuch as *it was the duty of the sheriff* to release them without an undertaking."

Walker v. Fetzer, 34 S. W. Rep. (Ark.) 536.

Action against surety on bond exacted by a justice as a prerequisite for an enforcement of a statutory lien against a horse. The Court says:

> "*The statute* * * * *nowhere provides* for the filing of a bond as a prerequisite for the enforcement of such lien. On the contrary, where the owner files with the justice a written statement, duly verified, setting forth the amount of his claim, his cause of action, and a description of the animal upon which he has a lien, it is the duty of the justice to issue an order to the constable to take the animal and hold it sub-

ject to the order of the Court, without requiring the filing of a bond. The bond was unauthorized, without consideration, and void."

The only ground for the decision was the same one applicable here, that there was no statute requiring the bond.

(d) *Bonds voluntarily given without authority of law.*

Byers v. State, 20 Ind. 47.

Action on a statutory bond for support.

"The bond then, which was the foundation of the present suit, was required and taken by the magistrate *without authority of law,* because the statute authorizing it was unconstitutional, and so far void and not law, and further, the bond was, we may say, forbidden by the Constitution, the paramount law, and hence was taken not only without law, but in violation of law; and the question arises, can such a bond be enforced under any circumstances? We think not. Such a bond is without a valid consideration, and that fact is a bar to an action upon it. Indeed, it is the settled law of this State, that where a bond is taken by an officer or court *acting simply under statutory power,* the instrument taken must be *authorized* by the statute or it will be void, and in suing upon such instrument, the complaint must set out the facts showing that the bond was taken in a case where the law authorized it, and in many cases it must appear that it was taken exactly or substantially in accordance with the statutory power."

It is not enough, therefore, that the taking of the bond is not prohibited. The official being a creature

of the statute, his power (whether to "demand" a bond or otherwise) must be measured by the terms of the statute.

Shaughnessy v. American Co., 69 Pac. Rep. (Cal.) 250.

In this case the Court said:

> "It has been decided by this Court in bank, that so much of Section 1203, C. C. P., as exacts It follows, therefore, that the undertaking itself It follsws, therefore, that the undertaking itself is void, unless, as contended, it should be upheld as a voluntary common law obligation. We cannot perceive how the bond under consideration can be upheld upon this theory. * * * This bond was given to secure a statutory privilege upon conditions to its enjoyment imposed by the statute, but the privilege was a constitutional privilege, which could not be interfered with by statute. The undertaking was, therefore, wholly without consideration, and void."

The bond was one under the Mechanics' Lien Law, to provide protection to mechanics and materialmen.

The case was affirmed in bank in 71 Pac. Rep. (Cal.) 701.

S. F. L. Co. v. Bibb, 72 Pac. Rep. (Cal.) 964.

In this case a similar conclusion was reached, although the bond did not purport to have been given pursuant to the unconstitutional statute, because it was inferred that the bond would otherwise not have been given. In our own case nothing is left to inference. The sheriff alleges that he "demanded" the bond.

These cases present the exact converse of the principle contended for in the case at bar. There the statute requiring a bond, it will be assumed that the bond would not have been furnished but for the statute, and the statute being unconstitutional, the bond is without consideration. Here the plaintiff demands a bond to which he is not entitled by statute, and it will be inferred, therefore, that but for the demand, the bond would not have been given, and it was therefore extorted under color of office.

II.

The Bond Having Been Exacted and Given as One of Indemnity, the Sheriff, in Default of an Allegation That He Has Paid the Judgment, Brought the Action Prematurely.

The bond itself is designated as one of indemnity (page 21). The condition of the bond provides that the surety "shall well and truly indemnify and save harmless". There is no suggestion of anything in the bond requiring the surety to pay anything to the obligee except as that may be necessary to "indemnify" him.

While it is true that the bond provides for indemnity against liability as well as loss, yet the obligation being to indemnify against a liability, and not to pay the same, the contract is not one to pay against liability, but of indemnity against loss by reason of such liability. This principle is made plain by the reasoning in American Co. v. Fordyce, 36 S. W. Rep. (Ark.) 1051.

In that case the plaintiff was allowed to recover because there was a covenant to discharge all liabilities. The Court said:

> "This is not simply a contract of indemnity. It is more; it is also a contract to pay liabilities. The difference between a contract of indemnity and one *to pay* legal liabilities is that upon the former an action cannot be brought, and a recovery had, until the liability is discharged; whereas upon the latter, the cause of action is complete when the liability attaches."

This distinction between an agreement to pay, and one to indemnify against liability, is also made plain by a series of decisions rendered in the Supreme Court of the United States.

In Mills v. Dow, 103 U. S. 423, there was a taking over of certain contracts, accompanied by an agreement to save the plaintiff harmless from liability thereon. And the Court says:

> "By the instrument in question, the defendants took the place of the plaintiff, and became, after the instrument was executed, principals in the work of constructing the railroad; and their acceptance of the assignment and the conditions preceding it, including the sub-contracts and what was due and to become due upon them. The contract is not merely one to indemnify the plaintiff from damage *arising out of his liability,* but is an agreement to *assume his contracts* and to discharge him from his liability."

In Johnson v. Risk, 137 U. S. 300, the question arose upon a dissolution of two partnerships, one of the partners buying the other's interest, and *agreeing to assume the payment* of the debts of each

firm, and to protect and keep the other harmless from the payment of any part thereof. As to this, the Court said:

> "It was not an agreement merely to indemnify Johnson from damage, but to assume the indebtedness and discharge him from liability."

Both of these cases refer to that of Wicker v. Hoppock, 73 U. S. 94, where Mr. Justice Swayne in the opinion of the Court points out the true distinction:

> "If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases, the obligee cannot recover until he has been actually damnified. He can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well settled distinction between *an agreement to indemnify and an agreement to pay.* In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid.

In the case at bar there is no pretense of an agreement to pay. There is nothing but an agreement to indemnify against loss or liability. And as stated by the Supreme Court, there being no agreement to pay, the agreement to indemnify against liability must be construed to mean indemnity from damage arising out of liability.

That in view of the principle that the obligation of a surety is *stricti juris,* it must not be enlarged by mere construction, is evident from the strong case of Taylor v. Coon, 48 N. W. Rep. (Wis.) 123,

where in a contract of indemnity in which it was provided that the surety would "upon the demand " of anyone or more of said stockholders who shall " be called upon as indorsers to pay such paper, " contribute towards the payment thereof, such sum " as such party ought to contribute in proportion to " the stock held by him", it was held that the complaint, which failed to state that the plaintiff had paid the sum that he was called upon to contribute, was bad on demurrer, for failure to allege that payment had been made. And yet the very stipulation of the bond had materialized, viz., that the stockholders had been called upon to make payment.

The same principle was announced in the case of Thompson v. Taylor, 30 Wis. 68, although there was an express indemnity against liability.

There is in the bond under consideration, a covenant of indemnity against loss and liability, but there is no pretense of a convenant "to assume or pay or discharge from liability".

See also:

Henderson v. Shillito, 60 N. E. Rep. (Oh.) 295;

Central Co. v. Louisville Co., 100 Fed. 545;

Weller v. Eames, 15 Minn. 376.

In that case the bond given was to indemnify against "legal liability", and it was urged that it was an undertaking to prevent liability accruing against the obligee, or to discharge and acquit him from it if it had already accrued. But the Court

held it an indemnity only against actual damage, and that a judgment recovered against the obligee but not paid did not actually damage.

The exact question is also determined in the case of Gilbert v. Wiman, 1 N. Y. 550. In that case the bond read:

"The condition of this obligation is such, that " whereas the said Luce has been appointed to the " office of Deputy Sheriff by the above named Gil- " bert, Sheriff as aforesaid.

"Now, therefore, if the said Luce shall so demean " himself in all matters touching his duty as such " Deputy Sheriff, that the said Sheriff shall not sus- " tain any damage or molestation whatsoever by rea- " son of any act from this date done, *or any liability* " *incurred* by and through said deputy, then this " obligation to be void."

Judgment was recovered against the plaintiff for the act of his deputy, and it was held that the plaintiff could not recover the amount of same without proving that he had paid it.

> "The distinction between the bond in question, and those above mentioned, consists, I apprehend, in this, that by the former, a charge or fixed legal liability is declared to be the injury from which the obligee is to be saved harmless. By the condition of the latter, the obligor stipulates that the Sheriff shall not sustain any damage or molestation by reason of any liability, etc. By the former he is to be saved from the thing specified; by the latter from its consequences, or in other words, from the damage or molestation which may result from the liability. The distinction is very important. It is rec-

> ognized in the cases to which reference has been made, and in others, and will be found to pervade most of the authorities which have been cited. It is the distinction between *an affirmative covenant for a specific thing,* and one of *indemnity against damage by reason of the non-performance* of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences to the parties are essentially different."

The same distinction between indemnity against liability, and an agreement to pay the same, is distinctly pointed out in Belloni v. Freeborn, 63 N. Y. 382:

> "Had this bond been conditioned solely to indemnify and save harmless from damages by reason of the liability of the obligee, the recovery would necessarily have been limited to the actual damages sustained by him. He could only have recovered to the amount of actual damnification. When the bond, as in this case, is conditioned as well to pay the debt or sum specified as to indemnify and save harmless the obligee against his liability to pay the same, the obligee may recover the entire debt or demand upon default in the payment, without having paid anything."

There is in the case at bar an indemnity against liability, but there is lacking the essential condition "to pay the debt". The obligee, therefore, cannot recover because he alleges that he has not discharged the obligation, out of which his liability arose.

> "The tendency of the more modern authorities is to adopt as the cardinal principle to be applied in the construction of such bonds (of indemnity) that actual compensation can only

> be given for loss actually sustained, unless it is evident that the parties have stipulated for some other and more extensive remuneration; and to give more weight to the general purpose of the bond as indicated by its provisions as a whole, and the interests of the parties in the subject matter, than to the precise form of words used in the particular clause".

Am. Ass. v. Waleen, 53 N. W. Rep. (Minn.) 867.

That was a case where the Court refused to follow the letter of the bond, only because the plaintiff had not in fact incurred any damage. Here, too, it may be that the plaintiff in error is wholly irresponsible, or indeed may never be called upon to pay the judgment. This is no idle suggestion, because in the opinion of the Supreme Court confirming the judgment against the sheriff, Cowden v. Finney, 75 Pac. Rep. 765, collusion is expressly insinuated. The Court says:

> "There are some things connected with this purchase on the part of the appellant which do not entirely satisfy us of the fairness of the transaction, and if the evidence as presented in the record were before us in the first instance for our consideration, we might find differently".

III.

To resume. The complaint alleging that the Affidavit and Notice served upon him were "duly filed as required by the Statutes of the State of Idaho", and the Supreme Court of that State having held in the Blumauer case, *supra,* that when these

papers are placed in the hands of the Sheriff "and " they are fair upon their face, he must proceed to " execute them in the manner pointed out in the " Statute. The law requires it, and the Sheriff " has no alternative"; and the complaint alleging that notwithstanding this, the bond was furnished "upon demand" of the Sheriff, the same was extorted by virtue of the office, was without consideration, and void.

And the bond providing only for indemnity against liability, and containing no agreement to pay or discharge same, is a bond of indemnity, and not one for payment, and the complaint alleging that the judgment obtained against the Sheriff "remains unsatisfied and unpaid", the plaintiff cannot recover.

Dated August 17, 1906.

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Of Counsel for Plaintiff in Error.

No. 1321

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

AMERICAN BONDING COMPANY OF BALTIMORE, a corporation,
Plaintiff in Error,
vs.
J. C. MILLS, JR., late Sheriff of Boise County, Idaho,
Defendant in Error.

AMERICAN BONDING COMPANY OF BALTIMORE, a corporation,
Plaintiff in Error,
vs.
WILLIAM FINNEY, late Sheriff of Blaine County, Idaho,
Defendant in Error.

BRIEF OF DEFENDANTS IN ERROR.

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Statesman Printing Co., Boise, Idaho.

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STATEMENT.

The above actions were brought to recover upon indemnity bonds in the respective cases upon which the defendant, the American Bonding Company, was surety. The facts are so nearly alike in both cases that we follow the example of the counsel for plaintiff in error and file one brief. The record to which we will refer, however, unless otherwise designated, is the record in the Mills case.

One Ralph Cowden was the owner of a certain band of sheep described in the transcript. About July 26, 1902, the Flato Commission Company, claiming to have a mort-

gage on said sheep executed by one R. L. Shaw, commenced proceedings by affidavit and notice under the statute to foreclose said mortgage. The statute under which they proceeded reads as follows:

"Section 3391. In proceedings to foreclose by notice and sale, the mortgagee, his agent or attorneys, must make an affidavit stating the date of the mortgage, the names of the parties thereto, a full description of the property mortgaged and the amount due thereon. Said affidavit must be placed in the hands of the sheriff together with a notice signed by the mortgagee, his agents or attorneys, requiring such officer to take the mortgaged property and sell the same."

Under the proceeding thus provided for, the sheriff took possession of the sheep in question. About August 9, 1902, Cowden, the real owner of the sheep, brought action in the State court to recover possession of the same or the value thereof. This action was against J. C. Mills, one of the defendants in error herein (Trans. p. 212). This action resulted in judgment in favor of Cowden and against Mills and Finney respectively. Upon appeal the judgments were affirmed.

At the time the sheriff was requested to take the sheep under the foreclosure proceedings, the Flato Commission Company furnished an indemnity bond to the sheriff, a copy of which is found in the record (Trans. p. 25). Upon these bonds the plaintiff in error was surety. The bonds were executed and delivered upon the same date the affidavit for foreclosure was sworn to and delivered to the sheriff (Finney case, Trans. pp. 21-194).

The judgment against the sheriff not being paid, the said sheriff commenced this action in the State court on the 12th day of May, 1904, to recover the amount of judgment theretofore recovered against him, such action being based

upon this indemnity bond (Trans. p. 20). The American Bonding Company and the Flato Commission Company were both made parties defendant. On May 27, 1904, the American Bonding Company appeared in the State court by general demurrer (Trans. p. 33). At the same time the bonding company alone filed its petition and bond for removal to the Federal court. (Trans. p. 30.) The defendant, the Flato Commission company, did not join in this petition for removal. The cause was remanded to the State court September 22, 1904. (Trans. p. 34.)

November 26, 1904, and after the cause was remanded, the defendant, the American Bonding Company, appeared in the State court and argued the demurrer, which was overruled. (Trans. p. 35.) It thereupon asked for and secured an extension of time in which to file answer in the State court. (Trans. p. 35.) The answer of the said bonding company was filed in the State court December 12, 1904. (Trans. p. 42.) February 4, 1904, the American Bonding Company again filed its petition and bond for removal to the Federal court. (Tran. p. 54.) The case was again remanded to the State court. The cause proceeded to trial in the State court and judgment was given to the plaintiff in the said State court. On February 16, 1904, the defendant petitioned for removal the Federal court at last determined to retain jurisdiction.

The cause was tried in the Federal court, a jury being waived, and judgment was given for the plaintiff for the amount of the judgment and interest and costs which had been recovered against Finney. (Trans. p. 219.)

Argument.

Jurisdiction.

The record discloses that the lower court was wholly without jurisdiction to hear and determine this case—

that the case was never properly removed to the Federal court. The plaintiff in error filed its demurrer and appeared in the State court May 27, 1904. (Trans. p. 33.) True, at the same time it filed its petition for removal but the cause was remanded to the State court September 22, 1904. (Trans. p. 39.) The cause therefore stood precisely as if no attempt to remove had been made. There could be no virtue in the unsuccessful attempt to remove. In other words, the State court had jurisdiction the same as if no petition for removal had at any time been filed. This being true, the plaintiff appeared in the State court, argued the demurrer to the sufficiency of the complaint December 26, 1904, which demurrer was overruled. The plaintiff in error then asked for and secured a signed stipulation for time to answer. An answer was filed December 12, 1904. (Trans. p. 42.)' On January 25th, in open court, the cause was set for trial by consent of both parties for February 4, 1905. (Trans. p. 85.) On February 4, 1905, a second petition for removal was presented. (Trans. pp. 55-60). The Federal court heard this immediately and the cause was again remanded—the grounds for remanding in both cases being that but one defendant had joined in asking for removal. February 16, 1905, was set for trial, the cause being called in the State court another petition for removal was presented. The State court tiring somewhat of this perpetual motion proceeded to trial, and verdict and judgment was rendered against the plaintiff in error in the State court. Upon this last petition for removal the Federal court finally concluded to retain the case.

From May 27, 1904, until February 16, 1905, this case was in the State court, and the plaintiff in error had submitted itself to the jurisdiction of that court. It had filed a demurrer, appeared and argued the same, took stip-

ulation to answer and filed its answer and consented to setting the case for trial. This was all without protest. (Trans. pp. 78-85.) We say that the fact that they made two attempts to remove wholly without the statute upon removal did not help them. They could derive no advantage or benefit for the final act of removal by prior attempts which were wholly insufficient. Therefore, upon February 16, 1905, they stood precisely in the same situation in the eye of the law as if they had never complained or attempted to get away from the jurisdiction of the State court. As we have stated, the case was remanded twice because both of the defendants did not join. When February 16th arrived one of the defendants could not join—its right to removal had passed. It had appeared once before. The removal act does not provide that a defendant may remove at the time of the appearance of an associate defendant. Each defendant's right to remove must depend upon the status of each at the time of appearance.

The petition for removal must be filed as soon as the defendant is required to appear in the State court, and if not filed at that time and motion to remand is made and denied, the judgment of the Federal court will be reversed with instructions to remove the cause to the State court.

Gerling vs. B. & O. Ry. Co. 151 U. S. 673.

Baltimore & O. R. Co. vs. Burns, 124 U. S. 673.

In the case below it is said: "Confessedly, Wessenberg lost his right to a removal by failing to make the application in time and as Fletcher can not take the case from the State court unless Wessenberg joins with him, it follows that he is subjected to Wessenberg's default." In this case the bonding company had lost its right to remove by the time its associate defendant had appeared, and as the Flato Commission Company could not remove without

the joinder of the Bonding Company no removal could be had.

Fletcher vs. Hamlet, 116 U. S. 408.

Manning vs. Amy, 140 U. S. 137.

A separable controversy is not introduced into the case by separate defenses, and the fact that one of the defendants is in default does not change the situation and entitle the contesting party to remove.

Putnam vs. Ingraham, 114 U. S. 57.

Wilson vs. Oswego Township, 151 U. S. 56.

Where there is no separable controversy and one of the parties fails to exercise his right to remove within the time prescribed, a subsequent joint application for removal will not avail.

Abel vs. Book, 120 Fed. 47.

All the defendants must unite in a petition for removal.

Chicago Rock Island Co. vs. Martin, 178 U. S. 245.

Bill of Exceptions.

The Court will observe that there is no bill of exceptions settled in this case and it is very doubtful if there are any of the questions preserved for presentation to this Court. Certainly the only possible question that could be considered is the sufficiency of the demurrer resting alone on the validity of the bonds. All of the other numerous assignments of error can not avail in the condition in which the record is found.

Only such rulings during the progress of the trial as are saved in a bill of exceptions will be considered on appeal.

Grayson vs. Lynch, 163 U. S. 468.

Pomeroy's Lessee vs. Bank, 68 U. S. 592.

The bill of exceptions must affirmatively show the errors alleged, timely objections and grounds clearly stated.

Newman vs. Company, 80 Fed. 228.

N. C. Ry. Co. vs. St. John, 85 Fed. 806.

We next call attention to the condition of the record with reference to preserved exceptions sought to be taken. The Court will observe that there is no bill of exceptions in the record. The only exception it would seem available here would be the exception taken in the overruling of the demurrer.

Graham vs. Bayne, 59 U. S. 60.

The rulings of the Court in admitting or rejecting evidence can only be considered when brought to this Court by bill of exceptions.

Suydan vs. Williamson, 61 U. S. 427.

Starn vs. States, 94 U. S. 76.

Neither depositions nor affidavits, though appearing in the transcript, can be regarded as a part of the record unless preserved by bill of exceptions.

Baltimore Co. vs. Trustees, 91 U. S. 127.

Bond Valid.

Assuming that the record is in such condition that the Court will consider the errors assigned or some of them, we will endeavor to meet the questions upon their merit.

The first principal question presented is: Was this bond upon which suit is brought a valid bond—such as the sheriff had a right to take? The objection to the bond as attempted to be made is that it was extorted "colore officii" and therefore void. In other words, that it was a case in which the sheriff was protected by process fair upon

its face and one which it was his duty to execute under the law without a bond (Trans. p. 188).

We contend that this bond meets in every particular the essentials of a valid common law bond or obligation. It will be observed that the complaint alleges that upon a certain day the sheriff took possession of certain property and that after taking possession of the same the said sheep were claimed by one Ralph Cowden. That thereupon and after such claim was made the said Flato Commission company, at whose instance the sheep were taken, in order to secure the sale of the same, entered into and gave the indemnity bond in question whereby it was agreed to save the said sheriff harmless by reason of the sale of said property, and from all liability. It then appears by the complaint that said Cowden afterwards commenced suit for the recovery of said sheep, or the value thereof, and judgment was rendered against the sheriff for the value of the same. This judgment is conclusive upon the question that the sheriff had no right to sell these sheep belonging as they did to Ralph Cowden. The simple question therefore is: The sheriff had possession of certain property which he, in fact, had no right to sell under the mortgage because the judgment has established that fact; nevertheless, the party who held the mortgage claimed that they should be sold and agreed that if he would sell them he, the sheriff, should be protected. This was a subject about which they had a right to contract. The consideration is apparent and conclusive and they voluntarily entered into an agreement whereby the sheriff was to be protected. Assuming that it was not a statutory bond, still it was not prohibited by statute or public policy and was concerning the subject about which the parties had a perfect right to make an agreement. It served its purpose, it enabled the party giving the bond to secure a sale of the

property which the sheriff otherwise would have been justified in not selling for the reason that it belonged to a third party. In other words while the officer was proceeding in good faith a question as to ownership arose and he had a right to protect himself.

We also call attention to the recitals of the bond which under all the authorities are binding and conclusive as against the surety. The bond recites the taking possession of the sheep under chattel mortgage given by one R. L. Shaw; the claiming of the sheep by a third party and the demand of the mortgagee for sale notwithstanding the claim (Trans. p. 25). These recitals taken in connection with the judgment, which is conclusive that the property did not belong to Shaw and was not covered by mortgage, furnish ample consideration for the bond. But in addition to this, as we said before, the bond served its purpose. The object for which it was given, to secure the sale of property, was accomplished.

We call attention to the manner of giving the bond. The bond bears date July 22, 1902. The affidavit for foreclosure bears date the same day (Trans. pp. 21, 194, Finney case).

Mr. Finney, the sheriff, states that the bond was given to him at the time they sent the papers on foreclosure (Trans. p. 184).

In the case below it was held that the bond, though not a statutory bond, was binding as a common law obligation.

"The object of the undertaking and its purport is too plain to admit of controversy. There is no question but what it is founded upon a valid, legal consideration. Why, then, is it not a good common law obligation? The principle is familiar that bonds intended to be taken in compliance with the statutes, although not done so, if entered into voluntarily and founded upon a valid consideration

and do not violate public policy or contravene any statute, will be enforced by common law remedies. * * * The undertaking served its purpose, to secure the release of the property attached, and the defendant is estopped from setting up such irregularities."

Bunneman vs. Wagner, 18 Pac. 843.

In the case below the principle is practically the same as the case at bar. The action was upon an indemnity bond. The sheriff had in his hands a writ of replevin which he was about to execute and before doing so demanded an indemnity bond. It was contended he had no right to ask for this and it was void for want of consideration. The Court said: "It is admitted that the bond is not a statutory bond in an action for replevin. On this appellants make their third point, which is that appellee as sheriff had no right to demand or receive this bond and no right to recover on it even admitting it was duly executed by appellants. To this it is answered that the statutes of this state nowhere forbid taking such a bond and if not expressly authorized by statute, it is, nevertheless, a good obligation at common law."

Wolfe vs. McClure, 79 Ill. 564.

The case below is one from the Court of Appeals for the Ninth Circuit. The bond was for the release of property attached but was not in conformity with nor according to the statute and it was claimed that the same was void. The Court said: "The undertaking appears to be valid as a common law obligation. As set forth in the record now before the Court it is under seal and recites as a consideration the release from attachment of all the property attached and the discharge of the attachment.

This was a sufficient consideration for the undertaking."

Ebner vs. Heide, 125 Fed. 683.

Palmer vs. Vance, 13 Cal. 553.

The rule has been universally upheld in the Federal courts that if a public officer demand a bond and the party gives it that it is valid unless the taking of the same is expressly prohibited by law or manifestly contrary to public policy. In the case below the United States, through its officers, demanded a bond covering the duties of a purser in the navy. There were two questions before the court. First, whether or not the United States had power to take a bond except wherein provided by statute. Second, if it did so, would it be extorting the bond under color of office and make the same void. "Upon this posture of the case a question has been made and elaborately argued at the bar how far a bond voluntarily given to the United States and not prescribed by law is a valid instrument binding upon the parties in point of law." The bond was held valid under such conditions.

United States vs. Tingey, 5 Peters, 116.

In another and later case a bond was demanded of an army officer assigned to duty in the signal service. It was conceded that there was no law providing for such bond and further admitted that the officer reluctantly gave said bond demanded by his superior officer, but it was held that the bond was good as a common law obligation, the Court holding that an offer to prove that the bond was given reluctantly and was demanded by the officer was properly rejected, saying:

"We think the evidence was properly excluded, although there was no statute specially providing for the execution of the bond by one occupying the position of Lieutenant

Howgate." The Court further said: "The consideration or condition of the bond must not be in violation of law. It must not run counter to any statute; it must not be either malum prohibitum or malum in se. Otherwise and for all purposes of security a bond may be valid though no statute directs its delivery. * * * It is a voluntary bond when it is not demanded by any particular statute or regulation based thereon and when it is not exacted in violation of any law or valid regulation of the department."

Moses vs. United States, 166 U. S. 571.

In the case below it was held that in order to constitute the taking of a bond under color of office there must appear in the case the element of fraud, oppression or circumvention. If the officer simply demands a bond and the party gives it it is a voluntary bond. The Court said: "There is no allegation or pretense that the bond was unduly obtained by the collector colore officii by fraud, oppression or circumvention. It must therefore be taken to have been a voluntary bond."

Speake vs. United States, 9 Cranch, 27.

"It is alleged as error that the bond in question was not required or authorized by law and was exacted by the commissioner of internal revenue colore officii, and was therefore void. The real question to be determined is whether there was a valid consideration for the bond. No statute directed the commissioner of internal revenue to require, or prescribed the giving of said bond. But it can not be maintained that the bond was not given voluntarily or was exacted colore officii by the commissioner if it was given by the obligor to promote its own convenience."

Diamond Match Co. vs. United States, 31 Fed. 273.

In the case below a county treasurer levied upon certain chattels and advertised them for sale for plaintiff's taxes. The owner executed to the treasurer a bond conditioned for the delivery of said chattels. Held, "That said bond though not authorized by statute is valid as a common law bond and action thereon can be maintained."

Pay vs. Shanks, 56 Ind. 554.

"As a statutory obligation the undertaking was invalid, and upon this undertaking the appellant Webb obtained a stay of proceedings pending the appeal. The undertaking thereby became operative and binding as a common law agreement."

Ryan vs. Webb, 39 Hun. 435.

In the case below the bond was executed conditioned to keep the sheriff indemnified against all damages, etc. "Though the bond might be defective as a statutory bond because not in the form prescribed by statute, it was notwithstanding valid as a common law obligation."

Garretson vs. Reeder, 23 Iowa, 21.

Where parties giving the bond secure what they desire, that is, where the bond serves its purpose, then there is a consideration and the bond is good unless affirmatively prohibited by statute or against public policy.

Healey vs. Newton, 55 N. W. 666.
Lustifield vs. Ball, 61 N. W. 339.
Finley vs. City, 60 Pac. 872.
Larsen vs. Winder, 55 Pac. 563.
Goodwin vs. Bunzl, 6 N. E. 399.

"Plaintiff appears to have acted in good faith in levying upon and selling property pointed out to him. He com-

mitted no willful trespass and there is no reason therefore why the promise to indemnify him should not be enforced."

Lerch vs. Gallop, 8 Pac. 322.

"Where two persons are claiming title to personal property adversely to each other and one of them calls upon a third person to assist in removing it and the assistant has reasonable grounds to believe that his employer is the owner of the property, a promise of indemnity to the assistant is valid in law although it subsequently turns out that the title of the employer was not good and the act of removal was a trespass."

Avery vs. Halsey, 14 Pick. 174.

Nelson vs. Cook, 17 Ill. 443.

It is proper for officers in whose hands writs may be given commanding that they levy upon personal property, to require indemnity in all cases where the ownership of the property to be siezed is in dispute or doubt. In such cases if the writ be regular upon its face and the officer acts in good faith he will be entitled to reimbursement of all damages which he may sustain should the seizure prove to be a trespass. The remedy upon the bond is equally availing whether it be a statutory bond or a voluntary obligation."

Porter vs. Stapp, 6 Colo. 32.

"An officer called upon to serve a process either by attaching property or arresting a person, if there be any reasonable grounds to doubt his authority to act in the particular case, has a right to ask for indemnity. He is not obliged to serve processes in civil actions at his own peril when the plaintiff in the suit is present and may take the responsibility upon himself."

Marsh vs. Gold, 2 Pick. 289.
Train vs. Gold, 5 Pick. 380.
Foster vs. Clark, 19 Pick. 329.

It is certainly well settled that where an officer is engaged in the discharge of his duty and a bona fide question arises as to his right to proceed or as to the ownership of the property which he is asked to seize under process that he may call upon the party asking for the service of the process to protect him by indemnity. And if the party gives the bond and the bond serves its purpose, that is to say, the officer proceeds, it is perfectly valid as a common law agreement. It is only invalid when expressly prohibited by statute or contrary to public policy. In addition to the above authorities, we call the Court's attention to the following authorities:

Anderson vs. Farnes, 7 Blakf. 343.
Forniquet vs. Teagarden, 24 Miss. 96.
Mays vs. Joseph, 34 Ohio St. 22.
Miller vs. Rhoades, 20 Ohio St. 494.
Davis vs. Arledge, 30 Am. Dec. 360.
McCartney vs. Shepard, 64 Am. Dec. 250.
Bordertown vs. Wallace, 11 Atl. 267.

The doctrine is thoroughly settled in the Federal Courts that an officer has the right for his protection to call for a bond in all cases where it is not prohibited by law, and there is no such thing as extorting a bond under color of office, unless there is either fraud or circumvention or demanding in instances where the law prohibits it.

Rogers vs. United States, 32 Fed. 890.
Jessup vs. United States, 106 U. S. 147.
Tyler vs. Hand, 7 How. 573.
United States vs. Hodson, 10 Wallace, 395.
United States vs. Mora, 97 U. S. 413.

The case below is one from the Eighth Circuit Court of Appeals. The bond was given to release certain liens and to prevent the filing of others. The Court said: "Technical objections to the bond as a stautory bond could not be considered. Assuming, but not deciding, that they were well founded, the bond is unquestionably a good common law bond. The rule rests upon the principle that although the instrument may not conform to the special provisions of the statute or regulations with which the party has executed it, notwithstanding it is a contract voluntarily entered into upon sufficient consideration for a purpose not contrary to law. Therefore, it is obligatory upon the parties to it in like manner as any other contract or agreement is held valid at common law. The bond possesses the requisites of a common law bond. It was voluntarily given upon a sufficient consideration for a lawful purpose and is as obligatory upon the makers as if it had conformed with the requirements of the act." The Court further holds in this case that it having appeared that the bond served its purpose and that the parties got the benefit of what they contracted for that as a matter of estoppel they should be prohibited from alleging its invalidity.

Carnegie vs. Hulburt, 70 Fed. 209.
Chadwick vs. United States, 3 Fed. 750.
United States vs. Howell, Fed. cases No. 15405.
United States vs. Garlinghouse, Fed. cases No. 15189.
Taylor vs. Fleckenstein, 30 Fed. 99.

"It was claimed if the bond contained an indemnity against the trespass in taking the property it was void * * * as taken under color of office by public officer. * * * The taking of the bond of indemnity in a case like this is no violation of the statute which prohibits the sheriff or

any other officer from taking any bond, obligation or other security by color of his office in any other case or manner than such as provided by law declaring every bond, obligation or security taken otherwise void. Taking indemnity by public officer is not unlawful, because not expressly authorized by statute. A bond valid at common law is not avoided by such a statute. The words color of office as used in such statute imply an illegal claim of right or authority to take security. Color of office as defined by the law dictionary is champerty, an act wrongfully done by an officer under pretended authority of his office and grounded upon corruption, to which the office is a mere shadow or color."

Griffiths vs. Hardenberg, 41 N. Y. 464.
Burrall vs. Acker, 35 Am. Dec. 582.

The sheriff may lawfully require a bond of indemnity before executing the attachment upon goods in the possession of a third person claiming them as his own. Such a bond was not within the prohibition of color of office.

Chamberlain vs. Beller, 18 N. Y. 115.

Counsel for plaintiffs in error seem to claim that when an officer has a process in his hand regular upon its face and valid in form that whatever he does under this process he is protected. In other words, although the sheriff in this case was asked to take possession of certain property which turned out to belong to another party that still he would have been protected by its process. We have watched curiously for the citation of authorities to this effect. So far as this case is concerned and the decision of our Court, this very case determines that the process is no protection to the sheriff when he takes property which belongs to a third person. In these cases of Cowden vs.

Mills and Cowden vs. Finney both the defendants justified under their processes and according to counsel that ought to have been sufficient to protect them. Notwithstanding this justification, however, when it was shown that the property belonged to Cowden the process was no protection, although valid in form and regular upon its face. Notwithstanding they had a valid process, they have got a judgment against them for many thousands of dollars and that judgment is conclusive in this case.

In the case below the process was regular upon its face. The Court said: "A person other than the defendant named in the writ whose property is wrongfully taken may indeed sue the marshal like any other wrongdoer in the action of trespass to recover damages for the wrongful taking; and neither the official character of the marshal nor the writ of attachment affords him any defense to such an action." So in this case the sheriff was asked to take property which another party claimed. He knew that if it belonged to the other party the process was absolutely no protection to him. He therefore asked for his indemnity, they gave it and it was a perfectly valid obligation. It secured all they asked, the bond served its purpose, the property was taken and sold and the other party was sued.

Lemmon vs. Feusier, 111 U. S. 17.
Derby vs. Gallup, 2 Wallace, 97.
Buck vs. Colbath, 3 Wallace, 334.

The leading case above not only holds the marshal liable but settles, so far as the Federal courts are concerned, that the official bondsmen are liable. If that is true, certainly he had a right to demand indemnity to protect his official bond.

Covell vs. Heyman, 111 U. S. 84.
West vs. Cabell, 153 U. S. 85.
Wise vs. Jefferis, 51 Fed. 644.

In the case below the process was a writ of attachment and the sheriff took property belonging to a third person.

It was held that such a person was a stranger to the writ and was not confined to any particular form of action, that he had a right to take any step or any proceedure which the law left open to him. In other words, he was not compelled to submit to the sheriff's jury or to any statutory mode of determining the right of property. He can select his own forum.

Wise vs. Jefferis, 51 Fed. 644.

The following cases will be found to sustain the principle that where an officer has a process in his hands, although regular in form and valid and takes property which turns out to belong to a third person, that the third person may sue him and his bondsmen in any form of action which he chooses to bring. He may select his own forum and his own kind of action. And neither the official character of the officer nor his process is any protection as against a third party.

Vickery vs. Crawford, 55 S. W. 560.
Rankin vs. Ekel, 1 Pac. 895.
Fox vs. Cronson, 2 Atl. 444.
Appleton Co. vs. Warder, 43 N. W. 791.
Cole vs. Mann, 62 N. Y. 1.
Scudder vs. Anderson, 19 N. W. 775.
Shumway vs. Rutter, 25 Mass. 443.

Recitals of the Bond—Estoppel.

In connection with this proposition as to the validity of the bond and the sufficiency of the complaint founded thereon the matter of the effect of the recitals and the question of estoppel are important. The bond recites among other things that the sheriff did after such notice

and affidavit were given take into his possession certain property which was claimed by other persons as their own and that notwithstanding such claim the said Flato Commission company required the sheriff to retain such property in his possession and sell the same, and that upon his doing so he should be held harmless from all liability by reason of his taking possession and retaining said property. The other recitals of the bond by which the parties are bound and from the disputing of which they are estopped form a complete consideration for this bond. Unquestionably when the property was claimed by other persons and the doubt arose, the sheriff had a perfect right to call for an indemnity before he proceeded. He knew that if the property belonged to other parties the process was no protection and that he would have no protection whatever. He was not bound to take the risk himself; it was perfectly proper for him to protect his official bond himself by indemnity.

"A recital in a bond concludes the parties as an admission of the facts recited."

Healey vs. Newton, 55 N. W. 666.
Am. & Eng. Ency. of Law, Vol. 24, p. 67.
State vs. McDonald, 4 Ida. 468.

In the case below the parties sought to prove that the property attached was not the property of one Hyde, but the Court said: "But their undertaking recites the bringing of the attachment suit, the issuance of the writ of attachment thereon against the defendant Hyde and the attachment of his property, etc. These recitals are as between the parties to the undertaking conclusive evidence of the facts recited."

Pierce vs. Whiting, 63 Cal. 540.

"Whatever an obligor recites in a bond to be true may be taken as true against him and need not be averred in a complaint on such bond nor proved on the trial."

Smith vs. Fargo, 57 Cal. 159.

Bowers vs. Beck, 2 Nev. 150.

In the case below there was a replevin bond given and the case at a subsequent term of the court was continued on condition that the sureties renew the bond. Thereupon one Judson signed his name under the other sureties and upon appeal it was held "that his execution of the bond estopped him from denying the recitals in it which imported that it was executed upon the institution of the replevin suit and taken by the sheriff at a time when it was lawful and proper to take the same."

Decker vs. Judson, 16 N. Y. 439.

"In the construction of bonds and conditions the rule of law is that if the bond be a single one it shall be taken most strongly against the obligor. * * * In the construction of conditions courts will look to the meaning of the parties as far as it can be collected from the instrument itself, and when the intention is manifest will transpose or reject insensible words and supply accidental omissions so as to give full effect to the intention of the party. * * * And when the condition of the bond is preceded by a recital of the explanatory facts if a certain particular thing be referred to, the recital of that fact will be taken as a conclusive admission of it. * * * Where a distinct statement of a fact is made in the recital of a bond, it is not competent for the party bound to deny the recital in an action upon an instrument and between the parties to it."

Murfree on Official Bonds, Sec. 131-2-3.

"It is a well settled rule of law that where a distinct statement of facts is made in the recital of a bond, it is not competent for the party bound to deny the recital in an action upon the instrument and between the parties to it."

Easton vs. Driscoll, 18 R. I. 321.

"It is not competent for the defendants to vary or contradict this recital by parol evidence. It was a substantive part of the agreement and not like the consideration clause of a conveyance or other instrument which may within certain limits be explained and varied by parol.'

Cocks vs. Barber, 49 N. Y. 110.

Payment of Judgment.

The next question presented by the brief of counsel for plaintiff in error is whether or not it is necessary for the sheriff to first pay the judgment recovered against him before he is entitled to sue upon the bond. The language of the bond is clear enough and answers this question itself. The bond says: "The condition of this obligation is such that if the Flato Commission Company of Omaha and the American Bonding and Trust Company of Baltimore City, Maryland, sureties, their heirs, executors, administrators or successors or either of them shall well and truly indemnify and save harmless the said J. C. Mills, etc., of and from all damage, expense, cost and charges and *against* all loss and *liability* which he, the said sheriff, etc., *shall sustain or in anywise be put to*, etc."

It will be seen that the indemnity is against all liability, loss, etc., which he shall sustain. The liability of the sheriff has been established and fixed permanently by the judgment and the judgment is therefore conclusive of his right to recover in this case. The word liability could have no other meaning. The bond does not assume and agree to

pay, it is true, but it does indemnify against liability and the liability is forever established by the judgment.

In the case below, in which the bond was very similar in terms, it is said: "As has been seen the indemnity given the constable was not only against actual damage, etc., but against all liability. Therefore, the moment the judgment was entered in favor of Macbeth & Compton and against the constable the latter became liable for the amount of it and thereupon a cause of action arose in his favor upon the bond."

Macbeth vs. MyIntyre, 57 Cal. 50.

Brodrib vs. Brodrib, 56 Cal. 563.

"It is undoubtedly the rule of the common law courts that to authorize a recovery on mere bond indemnity, actual damage must be shown. If the indemnity be against the payment of money plaintiff is certainly required to prove actual payment or that which the law considers equivalent to actual payment. But it has very generally been held that if the indemnity be not sufficient against actual damage or expense but also against any liability for such damage or expense the party need not wait until he has actually paid the judgment against him but his right of action is complete when he becomes legally liable for damages. This is in strict conformity with the letter of the bond or undertaking, for if the indemnity be good against any liability, clearly when the liability is legally imposed the condition is broken and a right of action is at once created." We invite particular attention to this case both as to the language of the bond and as to the reasoning of the Court.

Jones vs. Childs, 8 Nev. 121.

In the cases below it was expressly decided that where

a bond indemnifies against liability that the liability attaches as soon as the judgment is rendered and that the party is entitled to sue without payment of the judgment.

Tunstead vs. Nixdorf, 22 Pac. 472.

Botkin vs. Kleinschmidt, 52 Pac. 563.

"The undertaking was not against damage merely but was to indemnify against liability by judgment and costs as well. By the general rule of law a covenant to indemnify against a future judgment, charge or liability is broken by the recovery of a judgment or the fixing of a charge of liability in the matter to which the covenant relates."

Conner vs. Reeves, 103 N. Y. 527.

Am. & Eng. Ency of Law, Vol. 16, 2 Ed. 176.

"Where a party has an indemnity not only against actual damage or expense but also against any liability for damage or expense he need not wait to commence suit until he has actually paid such damage; his right of action is complete when he becomes legally liable."

Chace vs. Hinman, 8 Wend. 452.

Webb vs. Pond, 9 Wend. 421.

Carmen vs. Noble, 9 Penn. St. 371.

Fish vs. Dana, 10 Mass. 46.

Douglas vs. Howland, 24 Wend. 36.

Brown vs. Tigon, 92 Fed. 851.

We will not extend this brief by analyzing all of the authorities cited by opposing counsel on this question. We desire to notice some of them, however, and after a careful analysis of the same will say that no one of these cases cited bears directly upon the point sought to be made by counsel for plaintiff in error, while many of them indirectly, if not directly, support our contention.

In Johnson vs. Risk, 137 U. S., the obligation was "to protect and keep said Johnson harmless from the *payment* of any part thereof." In view of such language the reasoning of the court was of course to the effect that payment must be made in order to give rise to an action or right to recover, but no such language is found in this bond. The word payment is omitted and instead thereof the word liability is used. It is simply the question of the interpretation of the plain language of the bond, and the distinction between indemnity against liability and against payment is manifest and elementary.

The case of Wicker vs. Hoppock throws no light upon the subject here involved at all so far as we are able to understand the decision.

The case of Mills vs. Dow, 133 U. S., in so far as it bears upon this question supports our proposition, in fact, a critical analysis of the case leads to the conclusion that it is quite in point. The language of the bond construed in that case is "truly save harmless the said Mills from any liability by reason of the said contracts," etc. Now under this clause the Court expressly holds two propositions:

First. That the party suing upon the bond was entitled to sue as soon as the liability arose and was not compelled to pay the liability before bringing suit. "The agreement to assume the contract in connection with the further agreement to save plaintiff harmless from liability was broken by failure to pay the parties to whom the plaintiff was liable *and it was not necessary* to a breach that the plaintiff should show that he had first paid those parties." This is precisely our contention here upon practically the same language in the bond.

Second. The Court holds that this language constituted an implied contract upon the part of the bondsman to pay the liability, that it was in effect an assumption

of that liability whenever it arose. So, in this case, when the party signed the bond in question to indemnify against liability, the legal effect was just as held in the above case an agreement to pay the liability and remove it, for by no other way can the indemnity be made effective. In other words, if I agree to save A. harmless from liability and a judgment is rendered against A, in order to carry out the terms of that bond I must pay that liability, pay the judgment rendered. There were no words expressly assuming and agreeing to pay in the case of Mills vs. Dow; it was simply the construction which the Court put upon language almost identical with the language at bar. It is, in other words, something more than ordinary indemnity against damage, it is an obligation taken which makes it necessary for the party to stand in the attitude of paying as soon liability arises. In other words, to use the exact language of the Court and making it applicable to the case at bar, the contract is not merely one to indemnify the plaintiff from damage arising out of his liability but is an agreement to assume his contracts and to discharge him from his liability. So our bond here is not one simply to indemnify against damage. That is also provided for, but it is an agreement upon the part of the surety company, as it were, to assume whatever obligations or judgments arose out of the transaction and to take away the liability from the sheriff of discharging the same. We think the case is directly in point in support of our position.

We invite the Court's attention to the case of Taylor vs. Coon, 48 N. W., which sustains in full the contention which we are here making and makes quite clear the distinction between indemnity against liability and in indemnity against loss or damage. The following language is used in the authority: "If it contains an indemnity against *lia-*

bility to pay the endorsed paper there is a breach of the covenant of indemnity *as soon as the liability of the endorser to pay the same is fixed and an averment that he has paid it is not essential to the cause of action.*" Then the Court proceeds to interpret the language of the bond to ascertain whether it is an indemnity against liability alone or whether the language used makes it an indemnity against loss or damage by reason of such liability and says: "In the light of other stipulations in the agreement which so clearly evidence the intention of the parties thereto that the indemnity should only be against loss or damage, we think the subsequent words 'called upon to pay' as employed therein should be construed as the equivalent of 'compelled or required to pay.' " In other words, owing to the fact that there was in the bond much additional language to what is found in the bond at bar with reference to the matter of payment, the Court finally construed it to be an indemnity against loss or damage and a payment had to be made. But suppose the words with reference to payment had not been found in the bond, and they are not in the bond in question, would not this authority be direct to the point that we need not pay before suit and does not the case say, "All this is elementary law."

The case of Thompson vs. Taylor, when examined in the light of the facts and the language of the bond, again supports our position. The language of the bond in that case was as follows: "Shall be liable for and compelled to pay." That portion of the language, "shall be compelled to pay," led the Court to adopt the rule that payment must first be made before suit could be brought, but in its reasoning the Court expressly holds that there is a well recognized distinction between the cases where it is an indemnity against liability and an indemnity against payment. In

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Nos. 1320-1321

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE (a corporation),
Plaintiff in Error,

vs.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Defendant in Error.

AMERICAN BONDING COMPANY OF BALTIMORE (a corporation),
Plaintiff in Error,

vs.

J. C. MILLS, Jr., Late Sheriff of Boise County, Idaho,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

JESSE W. LILIENTHAL,
NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals,

For the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE (a corporation), *Plaintiff in Error,* vs. WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho, *Defendant in Error.*	No. 1320
AMERICAN BONDING COMPANY OF BALTIMORE (a corporation), *Plaintiff in Error,* vs. J. C. MILLS, Jr., Late Sheriff of Boise County, Idaho, *Defendant in Error.*	No. 1321

REPLY BRIEF OF PLAINTIFF IN ERROR.

This Court having intimated that it is precluded from considering the merits of the case "by the total lack of jurisdiction of the Circuit Court", we confine ourselves in this reply to the question of jurisdiction.

In the memorandum filed by the Court there appear to be certain inaccuracies as to dates, so that it would seem desirable to state the history of the case in chronological sequence.

May 13, 1904. Complaint filed in State Court (p. 23).

May 17, 1904. Summons served on Bonding Co. (p. 25) and on the supposed agent of the Flato Co. (p. 25).

May 27, 1904. Petition of Bonding Co. alone—for removal (p. 27).

Sept. 22, 1904. Cause remanded (p. 39).

Feb. 4, 1905. Order of State Court quashing service of summons on Flato Co. (p. 53).

Feb. 4, 1905. Second petition of Bonding Co. alone for removal (p. 55).

Feb. 11, 1905. Alias summons served on Flato Co. (p. 79).

Feb. 16, 1905. Petitions for removal filed both by Bonding Co. and Flato Co. (pp. 73, 75).

Feb. 17, 1905. Case tried in State Court, over protest of Bonding Co. (p. 91).

Mar. 6, 1905. Default entered in State Court against Flato Co. (p. 79).

Mar. 13, 1905. Motion to remand (p. 82).

Apr. 4, 1905. Remand denied (p. 93).

It is submitted that it is inaccurate to say that a

Circuit Court does not have jurisdiction of a case, which has been removed into and retained by it, when it is one that might have originally been brought in it. If the controversy is one between citizens of different States, and involves more than $2,000, the Circuit Court does have *jurisdiction.*

On the other hand, the Removal Act imposes certain conditions on the right to remove, that is to say, prescribes the method by which the Federal jurisdiction may be invoked; and these conditions may be insisted on by the plaintiff. They are no affair of the Court, unless the plaintiff invokes its authority and does so seasonably.

It is conceded that the case at bar involves a controversy between citizens of different States, and for more than $2,000. The petition of February 16, 1905, on which the remand was denied, was made by both defendants. It was accompanied by a sufficient bond. The only possible objection to it, therefore, is that it was not filed in time. But that is not a *jurisdictional* matter.

As was said in Martin v. Baltimore Co., 151 U. S. 673,

> "The time of filing a petition for removal is not a fact in its nature essential to the jurisdiction of the National Court like the fundamental condition of a controversy between citizens of different States."

And again in Powers v. Chesapeake Co., 169 U. S. 92, where after a first remand, a second removal was sustained,

> "The time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is in the words of Justice Bradley 'but modal and formal', and a failure to comply with it may be the subject of waiver or estoppel."

Now then, has the plaintiff ever objected to the removal on the ground that the petition was not filed in time? He certainly made no objection to the trial in the Court below. He enters into a formal stipulation for the waiver of a jury (p. 105) serves notice to produce papers (p. 104) and puts in and argues his case. But we are not left to inference as to his attitude towards the removal, for he states his objections specifically in his motion to remand (p. 81). The grounds of the motion when condensed are found to be only two, viz., that the Circuit Court has no *jurisdiction* and that both defendants did not join in the petition. Both defendants did join, and, according to the definitions of the Supreme Court, the Circuit Court did have jurisdiction. No objection having been made that the petition had not been filed in time, the lower Court properly denied the motion to remand.

The particular objection is made for the first time in the brief of defendant in error in this Court.

> "That the jurisdiction of the Circuit Court over a case removed into it from a State Court,

> cannot be defeated upon the ground that the petition for removal was filed too late, if the objection is not taken until after the case has proceeded to trial in the Circuit Court, has been distinctly decided by this Court."
>
> Martin v. Baltimore Co., 151 U. S. 673.

There is no room to say that the Bonding Company ever acquiesced in the jurisdiction of the State Court. At the time when it was in contemplation of law the only defendant, because it was the only defendant served, it, within the time provided by statute, filed its petition for removal. The cause having been remanded by the Circuit Court, there was nothing left for it to do but to contest the case in the State Court. This is not a "voluntary appearance". But although it was not necessary under these circumstances to do so, the Bonding Company protested against the jurisdiction of the State Court (p. 63) at the very inception of the trial.

However, the Supreme Court in a long line of cases, has decided distinctly that, even before a motion to remand has been made or decided, participation in a trial in the State Court, after filing the removal papers, is no waiver of the right to have the case disposed of in the Federal Court.

> The Removal Cases, 100 U. S. 457;
> Davis v. Fredericks, 104 U. S. 5;
> Oakley v. Goodnow, 118 U. S. 43.

We allow ourselves to call attention to the following statement of the Court, contained in the memorandum filed herein, and which is manifestly an inadvertence. In view of the above considerations, we do not deem the matter one of substance, but refer to it because it seems to have weighed with the Court. The statement is "The Flato Company did not plead to the complaints in the State Court, but on the *13th day* of *March,* 1905, filed therein its petition and bond for removal of the cases to the Court below, prior to which time, according to the affidavit of the counsel for the plaintiff, filed in opposition to the petition, the default of that Company for failure to appear, had been entered and judgment taken against it in the State Court."

The fact is that the Flato Company was first served with process on February 7, 1905, and that before the time to plead had arrived, and on *February 16,* 1905, and not as stated by this Court, on March 13, 1905, it joined with the Bonding Company in a petition for removal (pp. 73, 75).

It is respectfully submitted that this Court should retain jurisdiction and decide the case upon its merits.

JESSE W. LILIENTHAL,
NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Plaintiff in Error.

No. 1321

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

AMERICAN BONDING COMPANY, OF BALTIMORE (a Corporation),
Plaintiff in Error,

vs.

J. C. MILLS, Jr., Late Sheriff of Boise County, Idaho,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Citcuit Court for the District of Idaho, Central Division.

THE FILMER BROS. CO. PRINT, S. F., CAL.

No. 1321

UNITED STATES CIRCUIT COURT OF APPEALS

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AMERICAN BONDING COMPANY, OF BALTIMORE (a Corporation),
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vs.

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In the United States Circuit Court of Appeals, for the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland,
Plaintiff in Error,

vs.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,
Defendant in Error.

Statement of Errors, and Designation of Record to Be Printed.

To the Clerk of said Court, and to the Defendant in Error herein, and to W. E. Borah, Esq., Attorney for Defendant in Error:

You will please take notice that the plaintiff in error herein has filed its Record in this court herein, and, pursuant to Subdivision 7 of Rule 23 of this Court, files with said clerk a statement of errors upon which it intends to rely, and states said errors as follows, to wit:

I.

The Court erred as to said plaintiff in error, in overruling the demurrer of said plaintiff in error to defendant in error's complaint herein.

II.

The Court erred as to said plaintiff in error, in ordering judgment to be entered in favor of the defendant in error

in evidence of the entry from the judgment docket during the examination of the witness Tucker, the full substance of whereof is as follows:

"Judgment Debtor, J. C. Mills, Jr., Sheriff Boise County, Idaho. Judgment Creditor, Ralph Cowden. Amount, $19,195.87. Costs $145.15. Time of entry, June 20, 1903. Page of Judgment Book, book 2, page 120."

VII.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the papers marked Plaintiff's Exhibit "D," offered in evidence during the examination of the witness J. C. Mills, Jr., whereof the full substance is as follows:

(1) An affidavit by George W. Hawkes as the agent and representative of the Flato Commission Company, to the effect that on November 30, 1901, at South Omaha, Nebraska, one R. L. Shaw made and delivered to said corporation his promissory note for $10,000, and his further promissory note for $8,626.55, together with a certain chattel mortgage for the purpose of securing said note, on 3,500 head of yearling wethers and wool, 3,500 head of ewes, their increase and wool, 3,000 head of mixed lambs and wool, describing, with the marks thereon, and further stating that the date of maturity of each of said notes is past, that no portion of the principal or interest has been paid, and that there is due to said corporation

from said Shaw on said notes and mortgages, the sum of $18,626.55, with interest.

(2) The return of said Mills as sheriff, of said affidavit of foreclosure, wherein he states that on August 1, 1902, he took into his possession certain of the property described in said affidavit, and on August 12, 1902, sold certain of said property to the Flato Commission Company for the sum of $14,233.50, whereof after deducting commissions, the remainder, $13,871.59, was paid by him to said Company.

VIII.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the papers marked Plaintiff's Exhibit "E," offered in evidence during the examination of the witness J. C. Mills, Jr., whereof the full substance is as follows:

A letter from Hawley and Puckett, attorneys, to J. C. Mills, Sheriff Boise County, dated July 26, 1902, enclosing bond for $20,000 sued on herein, and statutory affidavit and notice in a foreclosure of chattel mortgage against certain sheep, in favor of The Flato Commission Company, and requesting that the matter be attended to at once; said affidavit and notice being those referred to under Assignments Nos. V and VII hereinbefore stated.

IX.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission

in evidence of the paper marked Plaintiff's Exhibit "F," offered in evidence during the examination of the witness J. C. Mills, Jr., the full substance whereof is, a notice to said Mills as sheriff of Boise County, from the Flato Commission Company, by its agent, directing him to take into his opssession the mortgaged property described in the affidavit already referred to, and to sell the same according to law.

X.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "G," offered in evidence during the examination of the witness J. C. Mills, Jr., which in full substance was, an indemnity bond by said Flato Commsision Company as principal, and the American Bonding and Trust Company of Baltimore, Md., as surety, to said Mills as sheriff of Boise County, Idaho, in the sum of $20,000.00, dated July 26, 1902, reciting that whereas by virtue of the affidavit already referred to, said sheriff was directed to take into his possession the property mortgaged by said Shaw, and to sell the same, and thereupon took into his possession certain property, and whereas upon such taking other persons or person claimed said property, and said Flato Commission Company required that said Mills as sheriff retain and sell the same, that said principal and surety

would indemnify said Mills, such sheriff, of and from all damage, expense, costs and charges, and against all loss and liability which said sheriff should sustain by reason of his taking, retention or sale of said property, said bond being that annexed to the complaint herein as exhibit "A."

XI.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the question, "Mr. Cowden afterwards brought suit against you?" asked of said witness J. C. Mills, Jr.

XII.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "H," offered in evidence during the examination of the witness J. C. Mills, Jr., which in full substance was a letter by said J. C. Mills to Charles F. Neal as agent for said American Bonding and Trust Company, dated August 29, 1902, notifying him, said Neal, that suit had been brought against said Mills as sheriff, to recover said sum of $21,-866.50 and damages for the sale of said sheep under the foreclosure already referred to.

XIII.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the remittitur from the Supreme Court during the examination of the witness J. C. Mills, Jr., which

in full substance was a remittitur from the Supreme Court of the State of Idaho, announcing the affirmance of the judgment and order denying a new trial in the case of Cowden vs. Mills, already referred to.

XIV.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "J," offered in evidence during the examination of the witness J. C. Mills, Jr., which in full substance was a letter from Ralph Smith as vice-president and general attorney of the American Bonding and Trust Company of Baltimore City, to Charles F. Neal, Agent, Boise, Idaho, acknowledging receipt of letter written by Mills to Neal, already referred to.

XV.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "K," offered in evidence during the examination of the witness J. C. Mills, Jr., which in full substance was a letter from said Neal as general agent, to R. W. Smith, Denver, Colorado, enclosing notice from Mills to Neal already referred to.

XVI.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "L," offered in evidence during the examination of the witness

J. C. Mills, Jr., which in full substance was a letter from Ralph W. Smith as vice-president and general attorney of the American Bonding Company of Baltimore, to W. E. Borah of Boise, Idaho, denying plaintiff in error's liability upon the indemnity bond to J. C. Mills, Jr., said bond being that annexed to the complaint herein as exhibit "A."

10 *American Bonding Company of Baltimore*

XVII.

The Court erred as to said plaintiff in error, in denying and overruling said plaintiff in error's motion to strike out such portions of the testimony of the witness J. C. Mills, Jr., as related to the giving of the bond in suit.

XVIII.

The Court erred as to said plaintiff in error, in overruling said plaintiff in error's demurrer to the evidence.

XIX.

The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admission in evidence of the deposition of Ed. H. Reid, the full substance whereof was to the effect that the bond in suit was not given voluntarily, but under duress and coercion by defendant in error Mills as sheriff, and that said bond was without consideration, and void.

XX.

The Court erred as to said plaintiff in error, in sustain-

ing defendant in error's objection to the admission in evidence of the deposition of John R. Bonson, the full substance whereof was to the effect first, that at the time of the alleged sale to Ralph Cowden, plaintiff in the action hereinbefore referred to, he had full knowledge and notice of the existence of the prior mortgage by R. L. Shaw to the Flato Commission Company, of the sheep alleged to have been converted by said Mills as such sheriff, second that the value of the sheep so alleged to have been converted was an amount smaller than that found by the District Court of the Third Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. J. C. Mills, Jr., Sheriff, etc., defendant.

XXI.

The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admission in evidence of the deposition of O. W. Eaton, the full substance whereof was to the effect, first that at the time of the alleged sale to Ralph Cowden, plaintiff in the action hereinbefore referred to, he had full knowledge and notice of the existence of the prior mortgage by R. L. Shaw to the Flato Commission Company, of the sheep alleged to have been converted by said Mills as such sheriff, second, that the value of the sheep so alleged to have been converted was an amount smaller than that found by the District Court of the Third Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. J. C. Mills, Jr., Sheriff, etc., defendant.

XXII.

The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admission in evidence of the deposition of George W. Hawkes, the full substance of which was to the effect that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Mills as sheriff, and that said bond was without consideration, and void.

XXIII.

The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to the admission in evidence of the deposition of James C. Dahlman as to the values of sheep therein referred to, the full substance of which said evidence so rejected was to the effect that the value of the sheep alleged to have been converted was an amount smaller than that found by the District Court of the Third Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. J. C. Mills, Jr., Sheriff, etc., defendant, said bond being that annexed to the complaint herein as exhibit "A."

XXIV.

The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to said plaintiff in error's objection to said plaintiff in error's offer to prove by the testimony of J. C. Dressler, first, that Ralph Cow-

den was not the owner of the sheep in controversy, and that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed, second, that whatever interest Ralph Cowden had or acquired in the sheep in controversy was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw, third, that the judgment in the case of Cowden versus Mills was excessive, and does not measure the true value of the sheep for the taking of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not in excess of $6,500 and that that amount is the total amount of damage of all sorts caused in the premises, if any.

XXV.

The Court erred as to said plaintiff in error, in sustaining defendant in error's objection to said plaintiff in error's offer to prove by the testimony of Ed Paine, first, that said Ralph Cowden was not the owner of the sheep in controversy, and that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed, second that whatever interest Ralph Cowden had or acquired in the sheep in controversy was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw, third, that the judgment in the case of Cowden vs. Mills was excessive, and does not measure the true value of the sheep for the taking of which it was recovered at the time of said taking, and

that the true value of said sheep was at said time not in excess of $6,500.00, and that that amount is the total amount of damage of all sorts caused in the premises, if any.

And said plaintiff in error, pursuant to said subdivision of said Rule, states that the following are the parts of said record which it thinks necessary for the consideration thereof:

I.

The complaint, page 1 to 6 thereof, inclusive.

II.

Demurrer to said complaint, page 13 thereof.

III.

Order overruling demurrer, pages 14 and 15 thereof.

IV.

Answer of this defendant, page 15 to 20 thereof inclusive.

V.

Petition for removal, page 51 to 56 thereof, inclusive.

VI.

Bond on removal, pages 57 and 58 thereof.

VII.

Supplemental petition for removal, page 71 to 73 thereof, inclusive.

VIII.

Order denying motion to remand, page 74 thereof.

IX.

Demurrer of this defendant, page 76 thereof.

X.

Order overruling demurrers, on page 78 thereof.

XI.

Deposition of Ed. H. Reid, page 89 to 94 thereof, inclusive.

XII.

Deposition of James C. Dahlman, page 96 to 104 thereof, inclusive.

XIII.

Depositions of O. W. Eaton and John R. Bonson, page 105 to 134 thereof, inclusive.

XIV.

Deposition of Geo. W. Hawkes, page 138 to 142 thereof, inclusive.

XV.

Transcript of testimony, and exhibits, from page 151 to 203 thereof, inclusive.

XVI.

Findings and decision, page 204 to 207 thereof, inclusive.

XVII.

Judgment, pages 208 and 209 thereof.

XVIII.

Proceedings on severance, from page 213 to 216 thereof, inclusive.

XIX.

Petition for writ of error, pages 221 and 222 thereof.

XX.

Assignment of errors, page 223 to 232 thereof, inclusive.

XXI.

Order for filing bond, pages 233 and 234 thereof.

XXII.

Order allowing writ of error, pages 235 and 236 thereof.

XXIII.

Bond on writ of error, pages 237 and 238 thereof.

XXIV.

Writ of error, page 239 thereof.

XXV.

Citation, page 240 thereof.

XXVI.

Clerk's certificate to Transcript, page 241 thereof.

NEAL & KINYON,
MORRISON & PENCE,
JESSE W. LILIENTHAL,
Attorneys for Plaintiff in Error.

Dated March 31, 1906.

[Endorsed]: 1321. In the United States Circuit Court of Appeals, for the Ninth Circuit. American Bonding Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, Plaintiff in Error, vs. J. C. Mills, Jr., late Sheriff of Boise County, Idaho, Defendant in Error. Statement of Errors and Designation of Record to be Printed. Filed March 31, 1906. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth District.

AMERICAN BONDING COMPANY OF BALTIMORE (a Corporation,)
Plaintiff in Error,
vs.
J. C MILLS, JR., Late Sheriff of Boise County,
Defendant in Error.

Designation of Additional Record to Be Printed.

To the Clerk of the above-named Court and to the Plaintiff in Error and its Attorneys of Record, Neal & Kinyon, Morrison & Pence, Jesse W. Lilienthal:

You will please take notice that the defendant in error, pursuant to subdivision 7 of rule 23 of the above court, files with said clerk a statement of additional record to be printed, to wit, all and the entire portion of the record not specified by the plaintiff in error, so as to make the record complete when printed as transmitted by the clerk of the lower court, calling especial attention to the affidavits in support of the petitions on removal and the judgment roll in the State court.

W. E. BORAH,
Attorneys for Defendant in Error.

Service admitted by copy this —— day of April, 1906.

———————

Attorneys for Plaintiff in Error.

[Endorsed]: 1321. In the United States Circuit Court of Appeals, for the Ninth Circuit. American Bonding Company of Baltimore, a corporation, Plaintiff in Error, vs. J. C. Mills, Jr., late sheriff of Boise County, Idaho, Defendant in Error. Designation of Additional Record to be Printed. Filed Apr. 7, 1906. F. D. Monckton, Clerk.

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In the United States Circuit Court of Appeals, for the Ninth District.

AMERICAN BONDING COMPANY OF BALTIMORE (a Corporation),
Plaintiff in Error,
vs.
J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,
Defendant in Error.

Order Extending Time to Docket Cause.

For good cause shown, it is hereby ordered that the time to file the transcript and docket the above-entitled cause in this Court, be and the same is hereby enlarged, and ex-

tended from the 30th day of December, 1905, to and including the first day of March, 1906.

Dated December 28th, 1905.

JAS. H. BEATTY,
Judge.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth Circuit. American Bonding Company of Baltimore, Plaintiff in Error, vs. J. C. Mills, Jr., late Sheriff, etc., Defendant in Error. Order Enlarging Time to Docket Cause. Filed Feb. 28, 1906. F. D. Monckton, Clerk.

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In the United States Circuit Court of Appeals, for the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE (a Corporation),
Plaintiff in Error,
vs.
J. C. MILLS, JR.,
Defendant in Error.

Order Extending Time to Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error herein, the American Bonding Company of Baltimore, may have to and including April 1, 1906,

wherein to file the record herein, and docket this case with the Clerk of this Court.

WM. B. GILBERT,
Judge of said Court.

Dated February 28, 1906.

[Endorsed]: In the United States Circuit Court of Appeals, for the Ninth Circuit. American Bonding Company of Baltimore, a corporation, Plaintiff in Error, vs. J. C. Mills, Jr., Defendant in Error. Order Extending Time. Filed Feb. 28, 1906. F. D. Monckton, Clerk.

[Endorsed]: No. 1321. United States Circuit Court of Appeals for the Ninth Circuit. American Bonding Company of Baltimore, etc., vs. J. C. Mills, Jr., Late Sheriff of Boise County, Idaho. Two Orders Extending Time to Docket Cause. Re-filed March 31, 1906. F. D. Monckton, Clerk.

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Complaint.

Comes now the plaintiff, and for cause of action against the defendant alleges.

1. That the defendant the American Bonding Company of Baltimore now is and during all the times hereinafter mentioned has been a corporation organized and existing and doing business under and by virtue of the laws of the State of Maryland and doing business also in the State of Idaho; that the defendant, the Flato Commission Company, is a corporation organized and existing under and by virtue of the laws of the State of Nebraska.

2. That the plaintiff all the times mentioned in the

complaint and while performing the acts and services in said complaint referred to was the duly elected and qualified sheriff of Boise County, Idaho.

3. That on or about the first day of July, 1902, the above named plaintiff as sheriff of Boise County, at the instance and request of the above named defendant, the Flato Commission Company, and upon affidavit and notice duly filed as required by the statutes of the State of Idaho relative to the foreclosure of a chattel mortgage, took possession of certain personal property, to wit: About 2,629 head of ewes branded quarter circle G with Black paint, also about 1,645 lambs branded quarter circle G with black paint, also 268 head of mixed yearlings branded quarter circle G with black paint also branded H with red paint, said sheep being known as the Cowden sheep and being the same sheep hereinafter described and referred to in a certain bond, a copy of which is hereafter attached; that after the said plaintiff had taken possession of said sheep by the request and at the instance of the said Flato Commission Company, the said sheep and all of them were claimed by Ralph Cowden as his separate and individual property.

4. That in order that the same plaintiff might hold said sheep, retain possession of the same and made sale thereof to satisfy the mortgage of the Flato Commission Company under which the same had been taken and upon the demand and at the request of said plaintiff, the said Flato Commission Company and the said American Bonding Company of Baltimore made, executed and delivered to the plaintiff their certain bond of indemnity in writing

conditioned that the said Flato Commission Company and the said American Bonding Company of Baltimore would indemnify and save harmless the said J. C. Mills, Sheriff, from all damage, expense, cost and charges and against all loss and liability which the said sheriff, his heirs, executors or administrators should sustain for or by reason of the taking into his possession, retention and sale of said property, said property being the same property above described and which was afterwards involved in the suit in this complaint referred to. A copy of said bond showing more completely the terms and conditions thereof is hereto annexed and made a part of this complaint and referred to as Exhibit "A." That the said bond is signed and executed in the name of the American Bonding and Trust Company of Baltimore City, Maryland. That the said American Bonding and Trust Company of Baltimore City, Maryland, is the same corporation and person as the above named defendant, the American Bonding Company of Baltimore, the said company having changed its name by authority of the legislature of the State of Maryland from the American Bonding and Trust Company of Baltimore City, Maryland, to the American Bonding Company of Baltimore, the said Company sometimes executing its instruments in one name and sometimes in the other.

5. That upon the execution and delivery of said bond of indemnity the said plaintiff retained possession of said sheep and sold the same at the instance and request and under the authority of the said Flato Commission Company and the American Bonding Company of Baltimore.

6. That thereafter the said Ralph Cowden commenced

an action against this plaintiff as sheriff of Boise County, in the District Court of the Third Judicial District of the State of Idaho in and for Boise County; that thereafter the said suit was transferred for trial to Canyon County in the above-named court and district. That the said plaintiff herein appeared as defendant in said suit and contested the same and did so at the instance and request and with the full knowledge, notice and consent of the said Flato Commission Company and the American Bonding Company of Baltimore above named. That thereafter the case came duly on for trial and that such proceedings were had that upon the 17th day of June, 1903, the Court made its findings of fact and conclusions of law, deciding and holding thereby that the plaintiff was entitled to the personal property heretofore described and to the return thereof or to the value thereof amounting principal and interest, to the sum of $19,195.87 and for costs, and that upon said findings and conclusions of law judgment by said court was duly entered wherein and whereby it was ordered, adjudged and decreed that the said Ralph Cowden have judgment against the defendant therein, plaintiff herein, J. C. Mills, Jr., sheriff, for the return of said property or for the value thereof in the sum of $19,195.87 and for costs of suit amounting to $145.15. That said judgment bears date June 17, 1903.

7. That thereafter an appeal was duly taken by this complainant to the Supreme Court of the State of Idaho and thereupon such proceedings were had that upon the second day of ————, 1904, the said judgment herein re-

ferred to was by the Supreme Court of the State of Idaho, duly affirmed and that said judgment remains unsatisfied and unpaid and is a liability against this defendant.

8. That by reason of said judgment as aforesaid and the affirmation of the same by the Supreme Court of the State of Idaho, this plaintiff is liable to the said Ralph Cowden in the sum of $19,195.87, judgment aforesaid, together with costs amounting to $145.15 with interest thereon at the rate of seven per cent per annum from June 17, 1903.

9. That the conditions of said indemnity bond, a copy of which is set forth here as Exhibit "A," had been broken and the defendants are liable to this plaintiff for the sum and amount aforesaid under and by virtue of the terms and conditions of said bond in the sum of $19,195.87, principal and interest, and for the further sum of $145.15 with interest on each of said amounts at the rate of seven per cent per annum from June, 17, 1903. That demand has been made of defendants for said amounts but they neglect and refuse to pay the same.

Wherefore plaintiff prays judgment against the above named defendants and each of them for the sum of $19,-341.02 with interest thereon at the rate of seven per cent per annum from June 17, 1903, for costs of suit and for all proper relief.

HARRY FISHER and
W. E. BORAH,
Attorneys for Plaintiff.

State of Idaho,
County of Ada,—ss.

W. E. Borah, being duly sworn, deposes and says: That he is one of the attorneys in the above-entitled action, that he has read the above and foregoing complaint, knows the contents thereof and that the facts therein states are true of his own knowledge except as to matters therein stated to be on information or belief and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that the plaintiff herein is absent from the county where the attorney resides and where the suit is filed.

W. E. BORAH.

Subscribed and sworn to before me this 12th day of May, 1904.

[Seal] CLINTON C. SIGGINS,
Notary Public.

Exhibit "A."

INDEMNITY BOND OF FORECLOSURE OF CHATTEL MORTGAGE.

Know all men by these presents, that we, the Flato Commission Company of Omaha, Nebraska, as principal, and the American Bonding and Trust Company of Baltimore, Md., as surety, are each held and firmly bound unto J. C. Mills, sheriff of Boise County, State of Idaho, in the sum of ($20,000.00) twenty thousand dollars, lawful money of

the United States to be paid to J. C. Mills, sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dates this 26th day of July, 1902.

Whereas under and by virtue of an affidavit on the foreclosure of a chattel mortgage given by one R. L. Shaw to the above named Flato Commission Company, and the notice required by the statutes of Idaho for the foreclosure of chattel mortgages, directed and delivered to the said J. C. Mills, sheriff of Boise County, the said sheriff was directed to take into his possession the said mortgaged property and to sell the same, and the said sheriff did thereupon take into his possession the following described property, to wit: Between six and seven hundred sheep branded with $\widehat{G}$ (quarter circle G.)

And whereas, upon the taking of said sheep, other persons or person claimed said property as their own, and

Whereas, the said Flato Commission Company notwithstanding such claim, requires that the said J. C. Mills, sheriff, that he shall retain said property in his possession and sell the same,

Now, therefore, the condition of this obligation is such that if the said Flato Commission Company of Omaha, and the American Bonding and Trust Company of Baltimore City, Md., sureties, their heirs, executors, administrators or successors, or either of them shall well and truly indemnify and save harmless the said J. C. Mills, sheriff,

his heirs, executors and administrators, of and from all damage, expense, costs and charges and against all loss and liability which he, the said sheriff and his heirs, executors or administrators shall sustain or in any wise be put to for the reason of the taking into his opssession, retention and sale of said property, claimed as aforesaid, then the above obligation to be void; otherwise to remain in full force and virtue.

THE FLATO COMMISSION COMPANY,
By ED H. REID,

[Seal]

Director, Agent and Representative, Principal.

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,
By H. E. NEAL,
Vice-President.

Attest: CHAS. F. NEAL.
Asst. Secty.

J. C. Mills, Jr.

[Title and Caption Omitted.]

Summons.

The State of Idaho Sends Greeting to the Above-named Defendants:

You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of the Third Judicial District, State of Idaho, in and for the County of Ada, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days; otherwise forty days. The said action is brought to recover from the defendants the sum of $19,341.02 with interest thereon at the rate of 7 per cent per annum from June 17, 1903, being the amount due plaintiff on a certain indemnity bond made and entered into between the defendants thereto, to indemnify and save harmless the said plaintiff, in certain acts as sheriff of Boise County, Idaho, in taking into his possession, retaining and selling certain property mentioned in the complaint; for which sum this plaintiff is liable under the judgment of the District Court of the Third Judicial District of Idaho, in and for Canyon County, and the affirmation of the same by the Supreme Court of Idaho, in the case of Ralph Cowden vs. J. C. Mills, Jr., for the costs of this suit and for all proper relief; all of which more fully appears in plaintiff's complaint filed herein, a copy of which is served herewith, hereby referred to, and made a party hereof.

And you are hereby notified, that if you fail to appear and answer the said complaint, as above required, the said plaintiff, will take judgment for the sum demanded in the complaint, to wit: $19,341.02 with 7 per cent interest thereon from June 17, 1903, and costs of suit.

Given under my hand and the seal of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada this 12th day of May, in the year of our Lord one thousand nine hundred and four.

[Seal] W. L. CUDDY,
Clerk.
By Otto F. Peterson,
Deputy Clerk.

W. E. BORAH and
HARRY FISHER,
Attorneys for Plaintiff.

Filed May 20, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. W. E. Borah and Harry L. Fisher, Attys. for Plaintiff. Filed Sep. 12, 1904. A. L. Richardson, Clerk.

Sheriff's Office,
County of Ada,—ss.

I hereby certify that I received the annexed summons on the 12th day of May, 1904, and personally served the same upon American Bonding Company of Baltimore a corporation organized and existing under and by virtue of the laws of the State of Maryland, and the Flato Commission Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, by delivering to and leaving with Charles F. Neal, statutory agent of said American Bonding Company and Flato Commission Company in the County of Ada, State of Idaho, on the 17th day of May, 1904, a copy of said sum-

mons, together with a copy of the complaint in the action referred to in said summons.

Dated this 20th day of May, 1904.

J. D. AGNEW, JR.,
Sheriff of Ada County,
By Elias Marsters,
Deputy.

Sheriff's fees: $2.35.

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[Title and Caption Omitted.]

Notice of Petition for Removal.

To W. E. Borah and Harry Fisher, Attorneys for Plaintiff:

You will please take notice that on the petition and bond, and the affidavit of Charles F. Neal, copies of which are herewith upon you served, the originals of which have been filed in the office of the clerk of the District Court for the Third Judicial District of the State of Idaho, in and for Ada County, and upon the summons, appearance and pleadings in said action, a motion will be made by the undersigned, on the 28th day of May, A. D. 1904, at two o'clock P. M. or as soon thereafter as counsel can be heard, at the courtroom in the courthouse in the said county of Ada, and will move that the said Court grant the said petition, and that said bond be accepted, and that said Court proceed no further in this suit.

NEAL & KINYON,
Attorneys for Defendant.

Boise, Idaho, May 27th, 1904.

Due service of the within notice, and copies referred to herein, accepted this 27th day of May, 1904, without waiver of any rights in the premises.

W. E. BORAH,
Attorney for Plaintiff.

Bond on Removal.

Know all men by these presents, that we, the American Bonding Company of Baltimore, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and having a principal place of business in Baltimore, Maryland, as principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at Boise City, in Ada County, State of Idaho, as surety, are held and firmly bound unto J. C. Mills, Jr., late sheriff of Boise County, Idaho, in the penal sum of five hundred ($500.00) dollars for the payment whereof, well and truly to be made unto the said J. C. Mills, Jr., late sheriff of Boise County, Idaho, his successors and assigns we bind ourselves, our and each of our successors, representatives and assigns, jointly and severally firmly by these presents.

Upon these conditions, that, whereas, the said American Bonding Company of Baltimore, having petitioned the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, Idaho, held in and for the County of Ada aforesaid, for the removal of a certain cause therein pending, wherein the said J. C. Mills, Jr., late sheriff of Boise County, Idaho, is plaintiff, and the American Bonding Company of Baltimore, a corporation

organized and existing under and by virtue of the laws of the State of Maryland; and the Flato Commission Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, are defendants, to the Circuit Court of the United States for the District of Idaho,

Now, if the said American Bonding Company of Baltimore, shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the records in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

In witness whereof the parties hereto have hereunto set their hands and seals this 27th day of May, A. D. 1904.

[Corporate Seal]

AMERICAN BONDING COMPANY OF BALTIMORE, Principal.

By CHARLES F. NEAL,
Gen. Agt. and Atty.

THE UNITED STATES FIDELITY AND GUARANTY CO.

By J. T. PENCE and
CLAUDE H. ROBERTS,
Their Attorneys in Fact.

The foregoing 2 pages consisting of copy of notice of petition for removal, removal bond accompanying same, are in the original bound in two seperate wrappers each endorsed as follows: (Omitting Title of Case and Caption.) No. ——. "Notice of Petition for Removal," "Petition for Removal," and "Undertaking." "Filed May 27, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. Filed September 12, 1904. A. L. Richardson, Clerk."

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[Title and Caption Omitted.]

Demurrer.

The defendant, the American Bonding Company of Baltimore, demurs to plaintiff's complaint on the following grounds:

1. That the plaintiff has not legal capacity to sue.
2. That there is defect of parties defendant, for the reason that there is no service of summons upon the defendant, the Flato Commission Company.
3. That the complaint does not state facts sufficient to constitute a cause of action.

THE AMERICAN BONDING COMPANY OF BALTIMORE,

By NEAL & KINYON,
Its Attorneys.

Due service of the within demurrer, with copy, accepted this 27th day of May, 1904.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: (Omitting Title and Caption.) Demurrer. Filed May 27, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk. Neal & Kinyon, Attys. for Defendants. Filed Sep. 12, 1904. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Order Remanding Cause.

On this day was announced the decision of the Court upon the motion to remand this cause heretofore argued and submitted, to the effect, that said motion be sustained and ordered that the above-entitled cause be and the same is hereby remanded to the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

It is further ordered that the original papers herein transmitted to this Court by the District Court aforesaid be returned to the said District Court, together with the Plea of Jurisdiction filed in this Court by the Flato Commission Company.

United States of America,
District of Idaho,—ss.

I, A. L. Richardson, clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of Order remanding cause No. 249, J. C. Mills, Jr., late sheriff, etc., vs. American Bonding Company of Baltimore, et al., has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in said district this 22d day of September, 1904.

[Seal] A. L. RICHARDSON,
Clerk.
By———————— Deputy Clerk.

[Endorsed]: Order Remanding Cause. Filed Sept 22d, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk.

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[Title and Caption Omitted.]

Order Overruling Demurrer.

The demurrer in the above cause having been argued and taken under advisement, the same is this day overruled. It is therefore ordered and adjudged that the demurrer in the above-entitled cause be and the same is hereby overruled.

GEO. H. STEWART,
Judge.

[Endorsed]: Order Overruling Demurrer. Filed Nov. 26, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk.

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[Title and Caption Omitted.]

Stipulation Extending Time to File Answer.

It is stipulated and agreed that the defendant, the American Bonding Company, may have until Monday the 12th

day of December, 1904, to file and serve its answer herein.

W. E. BORAH,
Attorney for Plaintiff.

Stipulation. Filed Feby 7th, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk.

[Title and Caption Omitted.]

Answer.

Comes defendant, the American Bonding Company of Baltimore, and for its separate answer herein, admits, alleges and denies as follows:

I.

Admits the allegations of paragraph 1 and 2 of said complaint.

II.

Answering paragraph 3 this defendant admits, that defendant the Flato Commission Company, on or about the 24th day of July, 1902, did file with plaintiff as sheriff of Blaine County, Idaho, an affidavit and notice in due form of law as required by the Statutes of the State of Idaho, relative to the foreclosure of chattel mortgages under the process of "Notice and sale," admits the execution of a bond of which the copy annexed to said complaint is a substantial copy. Further says, that this defendant has not information or belief sufficient to enable it to answer the other allegations of paragraph 3, to wit: That under and by virtue of the affidavit and notice so executed by said Flato Commission Company, plaintiff took possession of 5469 head of sheep or any other number of sheep, branded

as in said paragraph set out, or that all or any of said sheep were claimed by Ralph Cowden or by any other person as his separate and individual property, and therefore denies each and all of said allegations, and further alleges that if any sheep were taken by virtue of said Writ which this defendant denies, they were the property of R. L. Shaw.

III.

Answering paragraph 4 of said complaint this defendant admits the signing of the bond therein mentioned, and further answering denies that said bond was made, executed and delivered for the purpose in said paragraph set out, to wit, in order that plaintiff might hold said sheep, retain possession of the same and make sale thereof to satisfy the mortgage of the Flato Commission Company.

Further answering said paragraph 4, this defendant alleges the facts as to the execution of the same to be as follows: That when said affidavit and notice as mentioned by plaintiff were delivered to plaintiff by the Flato Commission Company for service, in the manner provided by law, to wit, by levy, advertisement and sale, the plaintiff declined to serve the same by levying and taking into his possession the personal property therein described, or do any other thing whatever by law of him required until he had first been indemnified by defendant, the Flato Commission Company, with an indemnity bond, conditioned as in paragraph 4 set out.

That thereafter defendant, the Flato Commission Company, in order that it might have and receive at the hands of the said plaintiff, sheriff as aforesaid, the service and

duty by him owing in the premises to the said Flato Commission Company, did, on said sheriff's demand, and refusal to act unless and until so indemnified, procure to be executed and delivered to the plaintiff as sheriff aforesaid a bond of indemnity conditioned in manner and form as aforesaid required by said plaintiff; that is to say, as in said paragraph 4 set out. That said bond of indemnity was not voluntary but was coerced and extorted from said Flato Commission Company without authority of law, and in violation of law, and was so executed solely in order that said Flato Commission Company might require and have at the hands of plaintiff as sheriff aforesaid service and duty which he by law was required to render to said Flato Commission Company upon the payment or tender of his lawful fees therefor, which fees were then and there tendered and paid, and said Flato Commission Company was entitled to said service without any other or further requirement or demand whatsoever on the part of said plaintiff, sheriff as aforesaid. That said bond was taken by said plaintiff as sheriff aforesaid under color of his office as sheriff as aforesaid and is wholly unauthorized by law and is wholly without consideration and is void and illegal, wherefore, this defendant ought not to be charged and holden on the same.

IV.

Answering paragraph 5 defendant denies that said bond was executed for the consideration of the retention of possession of said sheep by plaintiff, as sheriff aforesaid; denies that said sheep were levied upon at the instance or request, or under the advice or authority of this defendant;

and further answering alleges the facts with reference to the surroundings of the execution and giving of said bond are as set forth in paragraph 4 of this answer.

V.

Answering paragraph 6 of said complaint, this defendant says that he has not sufficient information or belief to enable it to answer the allegations of paragraph 6; that one Ralph Cowden had commenced an action against plaintiff as sheriff of Blaine County, Idaho, and had recovered judgment in the District Court of the Third Judicial District of Idaho, in and for Canyon County, Idaho, for the sum of $19,195.87, and for costs amounting to $145.00 and wherein it was ordered and adjudged that said Cowden have a return of the property described in said affidavit and notice, and so as alleged, claimed by said Cowden, or in lieu thereof his damage in the said sum of $19,195.87 and costs in the sum of $145.00 nor of any other judgment for return of property or damages or costs in said matters, nor of the affirmance of any such judgment, or any judgment in the premises, on appeal in the Supreme Court of Idaho. Nor of the fact of plaintiff herein being liable to Ralph Cowden, in the sum as in said paragraph 6 alleged or any other sum or sums of money by reason of such alleged judgment; nor of there being any judgment as alleged by plaintiff growing out of the matters alleged in said complaint, and for this reason denies the same.

Further answering said paragraph 6 this defendant denies, that plaintiff herein appeared in any such alleged suit, and contested the same at the instance or at the request, or with the full knowledge or any knowledge, or

with notice to, or with the consent of, or by the advice of this answering defendant.

VI.

Answering paragraph 7 of the complaint herein, this defendant denies, that the conditions of said indemnity bond have been broken; denies that this defendant is liable to plaintiff because of the execution of said alleged bond, and by virtue of the terms and conditions thereof in the sum of $19,195.87, principal and interest, and the further sum of $145.00 costs, with interest on said amounts as in said paragraph 7 alleged or in any other sum or sums.

VII.

Answering the allegations of paragraph I of the second cause of action of plaintiff's complaint, adopting the allegations of paragraphs 1, 2, 3, 4, 5, 6 and 7 of first cause of action as a part of the second cause of action, this defendant adopts his answer to the aforesaid seven paragraphs comprising the first cause of action as fully as though they were fully in this paragraph repeated and set forth.

VIII.

Answering the allegations of paragraph 2 of second cause of action, this defendant says that it has not information or belief sufficient to enable it to answer the allegations of said paragraph 2, to wit: That plaintiff in contesting said alleged action, referred to in the first cause of action set forth in said complaint, has paid out, contracted for and become liable for costs and expenses in traveling and attorneys' fees in the total su mof $19,341.02 as in said paragraph 2 set out, or any part thereof, and therefore, denies the same.

Second Defense.

For a further and second defense this defendant says that it adopts the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of its answer herein as fully as though herein fully set out, and says that under said facts the bond sued on in this action is without valid consideration, was coerced and extorted from defendant, the Flato Commission Company, was so taken and required without authority of law; and contrary to both the statute and the policy of the law, and plaintiff is not entitled to recover thereon against this defendant.

Third Defense.

For a third and further defense, this defendant says that the complaint herein does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

Wherefore this answering defendant asks that this action be dismissed as against it, and that it recover its costs herein expended.

NEAL & KINYON,
Attorneys for American Bonding Company.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being first duly sworn, deposes and says that he is one of the attorneys in the above-entitled action for defendant, the American Bonding Company of Baltimore, that he has read the foregoing answer, knows the contents thereof, and that the facts therein stated are true of his

own knowledge except as to the matters therein stated to be on information and belief, and, as to those matters he believes them to be true. That affiant makes this affidavit for the reason that defendant, the American Bonding Company of Baltimore, is a corporation and absent from the County where the attorney resides and where the suit is filed.

B. F. NEAL.

Subscribed and sworn to before me this 12th day of December, A. D. 1904.

[Seal] L. V. HOUSEL,
Notary Public.

[Endorsed]: Answer. Filed Dec. 12, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk.

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[Title and Caption Omitted.]

Motion to Quash Service of Summons.

Comes now the defendant, The Flato Commission Company, above named and specially appearing for the purposes of this motion, and for no other purpose, moves to set aside and quash the service of the summons herein upon this defendant, upon the grounds and for the reasons:

1. That the pretended service of summons in this cause upon this defendant is not a legal or proper service of summons, or a service at all, in this: That Charles F. Neal mentioned in the return of the sheriff herein as the person upon whom said service was made in behalf of this defendant, and as the statutory agent thereof, was not and

is not, and never was the agent or representative, either statutory or otherwise, of this defendant, and has never at any time acted as such, or been appointed as such agent or representative under the laws of the State of Idaho, or otherwise, as shown by the affidavits of Charles F. Neal and James C. Dahlman, and the certificate of the Secretary of the State of Idaho, a copy of each of which is herewith served and made a part hereof.

2. That this motion is based upon said summons, the return of the sheriff, the affidavits of Charles F. Neal and James C. Dahlman, attached to the Plea to the jurisdiction filed herein and the certificate of the Secretary of the State of Idaho, the originals of which are filed herein, and a copy of which is herewith served.

HAWLEY, PUCKETT & HAWLEY,
Attorneys for the Flato Commission Company, a Corporation.

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[Title and Caption Omitted.]

Affidavit of Charles F. Neal.

State of Idaho,
County of Ada,—ss.

Charles F. Neal, being first duly sworn according to law, deposes and says:

That during the day May 17, A. D. 1904, at my offices in the Sonna Building, and in room 305 of said Building, Boise, Idaho, Elias Marsters, a then deputy sheriff of Ada County, Idaho, served on me one copy of summons and one copy of complaint in the case of J. C. Mills, late sheriff

of Boise County, Idaho, plaintiff, vs. American Bonding Company of Baltimore, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and the Flato Commission Company, a corporation, organized and existing under and by virtue of the laws of the State of Nebraska; also one copy of summons and one copy of complaint in the case of J. C. Mills, late sheriff of Boise County, Idaho, plaintiff against the same defendants which cases were then pending in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

On this particular date I was the duly authorized statutory agent of the American Bonding Company of Baltimore, having been appointed under the provisions of section 2653 of the Revised Statutes of Idaho as amended by an act approved March 10, 1903, and my appointment having been filed as required by law.

Mr. Elias Marsters first served the papers on me against the American Bonding Company of Baltimore, of which I acknowledged service in each of the above entitled cases for the American Bonding Company of Baltimore. He then attempted to serve on me the copies of two summons and complaint against the Flato Commission Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska as set out in the complaints in these actions. I then and there told deputy sheriff Elias Marsters that I was not the statutory agent of the Flato Commission, that I never had been the statutory agent of the Flato Commission Company, nor had I ever represented the Flato Commission Company in any ca-

pacity. Mr. Elias Marsters then asked me if I knew who was the statutory agent of the Flato Commission Company, to which question I answered that I did not know, but that as Messrs. Hawley & Puckett, attorneys of this City, had heretofore represented to my personal knowledge the Flato Commission Company as their attorneys, in other suits, that they, Hawley & Puckett, could probably inform him who the statutory agent for this State is. Mr. Elias Marsters, deputy sheriff, left no papers with me other than one copy of summons and one copy of complaint in each of the cases hereinabove described against the American Bonding Company of Baltimore, Maryland.

The foregoing copy of summons and complaint in the case of J. C. Mills, Jr., vs. American Bonding Company of Baltimore, et al., and the copy of summons and complaint of William Finney vs. American Bonding Company of Baltimore, et al., which were served on me as statutory agent of the American Bonding Company, were the only papers served on me, and the only papers left with me on the date in question, or at any other time by the said Elias Marsters, or any other person in connection with process in these cases.

And further affiant deposes and says that he has personally made a diligent search of the records in the office of the Secretary of State of the State of Idaho, and that he failed to find that the Flato Commission Company, a corporation organized under the laws of the State of Nebraska, and one of the defendants herein, had filed any authorization of statutory agent under the provisions of section 2653 of

the Revised Statutes of the State of Idaho as amended by an act approved March 10, 1903, or has it filed any papers whatever in the said office.

And further affiant saith not.

CHARLES F. NEAL.

Subscribed and sworn to before me this 31st day of January, A. D. 1905.

[Seal] L. V. HOUSEL,
Notary Public.

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Certificate of Secretary of State.

STATE OF IDAHO.
OFFICE OF THE SECRETARY OF STATE.

I, Will H. Gibson, Secretary of the State of Idaho, and custodian of the records of corporations, do hereby certify: that I have made diligent search of the records in my office, and fail to find the

Flato Commission Company

a corporation reputed to be organized under the laws of the State of Nebraska, has complied with section 2653 of the Revised Statutes of the State of Idaho, as amended by an Act Approved March 10th, 1903, by filing in this department the articles of incorporation duly certified to by the proper authorities, and an instrument designating statutory agent and principal place of business within this State.

In witness whereof, I have hereunto set my hand and affixed the Great Seal of the State.

Done at Boise City, the Capital of Idaho, this 27th day of January, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America, the one hundred and twenty-ninth.

[Seal] WILL H. GIBSON,
Secretary of State.

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Motion to Quash.

Service accepted and motion waived.

W. E. BORAH,
Atty. for Pltff.

[Endorsed]: Filed Feby. 1st, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. Hawley, Puckett & Hawley, Attys. for Flato Com. Co. Defendants.

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J. C. MILLS,
vs.
AMERICAN BONDING CO. et al. } Civil Trial No. 25.

and

WILLIAM FINNEY,
vs.
AMERICAN BONDING CO. et al. } Civil Trial No. 26.

Minutes of Court.

In these cases the motion of the defendant the Flato Commission Co. to quash service of summons as to said Flato Commission co., were sustained. Whereupon the

defendant American Bonding Co. presented its motion for the removal of the cases to the United States Court. The Court declined to rule on the motion for removal till some action is taken in the matter by the United States Court. Counsel for the plaintiffs duly excepted to the ruling of the Court in sustaining the motions of the defendant the Flato Commission Co. to quash services of summons as to said Flato Commission Co.

State of Idaho,
County of Ada,—ss.

I, W. L. Cuddy, clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing is a true and complete copy of the orders of the Court, made in the above-entitled cases on February 4, 1905, as the same appears of record in Journal "K" of the District Court, at page 111.

Witness my hand and the seal of said Court this 7th day of February A. D. 1905.

[Seal] W. L. CUDDY,
Clerk District Court Ada County, Idaho.
By Otto F. Peterson,
Deputy.

[Title and Caption Omitted.]
State of Idaho,
County of Ada,—ss.

I, W. L. Cuddy, Clerk of the District Court in and for Ada County, Idaho, hereby certify, that the original summons issued herein on the 13th day of May, 1904, is the

only summons that had been issued out of my office at the time of the quashing of the service of summons as to the Flato Commission Company, defendant in the above-entitled action, and that no alias summons had issued out of said court at the time of the filing of petition and bond for removal in this cause under date of February 4, 1904.

[Seal] W. L. CUDDY,
Clerk of District Court,
By Otto F. Peterson.

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[Title and Caption Omitted.]

Petition for Removal of American Bonding Company of Baltimore.

Your petitioner, the American Bonding Company of Baltimore, respectfully shows to this Honorable Court, that it is one of the defendants in this action, which is of a civil nature, and the matter and amount in dispute in this cause exceeds in value the sum of two thousand dollars, exclusive of interest and fees; and two (2) that the controversy herein is between citizens of different states; that the plaintiff was at the time of the beginning of this action, and still is, a citizen of the State of Idaho, residing in Boise County in said State; that your petitioner, the American Bonding Company of Baltimore, was, at the commencement of this action, and still is, a citizen of the State of Maryland, and of no other State, residing at Baltimore City, in said State; (3) that the Flato Commission Company, defendant herein, is a corporation, and was at the commencement of this suit, and still is, a citizen of

the State of Nebraska, and of no other State, residing at South Omaha in said State; and that your petitioner, the American Bonding Company of Baltimore, desires to remove this suit before the trial thereof, into the next Circuit Court of the United States to be held in the District of Idaho, Central Division.

II.

Your petitioner, the American Bonding Company of Baltimore, further states that the Flato Commission Company has not now, and has never had, a statutory agent for the purpose of service of summons, as required by section 2653, Revised Statutes of 1887, and acts amendatory thereof; and further represents and states to this court upon information and belief that the Flato Commission Company is not now, nor has it for more than two years last past, and since long prior to the beginning of action herein, been doing any business of any kind whatever in the State of Idaho, and has no resident agents or representatives therein, and has had no agents or representatives within the State of Idaho since long prior to the beginning of suit herein upon whom service of summons could be had, which fact has been well known to plaintiff herein, as this petitioner is informed and believes, and therefore alleges on information and belief. Your petitioner, the American Bonding Company of Baltimore, further alleges that the return of service of summons in this case as served upon Charles F. Neal as statutory agent of the Flato Commission Company is false and untrue and was made, as this petitioner is informed and believes, and therefore alleges on information and belief, made fraudu-

lently, falsely and corruptly, with the intent and for the purpose of defeating the jurisdiction of the Circuit Court of the United States, and prevent a removal of said cause by this petitioner. Your petitioner alleges that in truth and in fact no service of summons was made upon Charles F. Neal as statutory agent of the Flato Commission Company, and that the return herein of service upon said Charles F. Neal as statutory agent of the Flato Commission Company is false and untrue, and was made and caused to be made for the sole purpose and with the intent of preventing and defeating the right of this petitioner, the American Bonding Company of Baltimore, to remove this cause into the Circuit Court of the United States, for the District of Idaho, Central Division.

III.

Your petitioner states further that it heretofore, on the 27th day of May, 1904, and within the time allowed by law, filed a petition for removal of this cause to the United States Circuit Court for the District of Idaho, Central Division, and that said cause was removed to said Court, and that, thereafter, on or about the 13th day of September, 1904, said cause was, by the Judge of the said Circuit Court of the United States within and for the State of Idaho, remanded to the District Court of the Third Judicial District of the State of Idaho in and for Ada County, for the reason that it appeared that there was in the record a service of summons upon Charles F. Neal as statutory agent of defendant Flato Commission Company regularly upon its face, and such defendant the Flato Commission Company had not joined in the removal of said cause, and

for this reason said cause was held not to be a removable cause at said time and said cause was remanded to this Court for further proceedings; further that on the 4th day of February, 1905, upon the application of the Flato Commission Company, the said Flato Commission Company appearing for the sole purpose of quashing the service of summons so as aforesaid returned as made by serving summons upon the said Charles F. Neal as and for the duly authorized statutory agent of said defendant the Flato Commission Company, and, on the said 4th day of February, 1905, said Flato Commission Company was dismissed from said cause and said service of summons quashed and this cause is for the first time pending as against defendant, the American Bonding Company of Baltimore solely. In support of this application for removal petitioner refers to and makes a part hereof the following, to wit, the application for removal filed by petitioner under date of May 27th, 1904, in this Court, the plea to the jurisdiction of the United States Circuit Court filed by the Flato Commission Company in the United States Court and returned with the papers to this Court, the motion to quash service of summons as to the Flato Commission Company, filed by the Flato Commission Company herein with affidavits, certificates and exhibits attached to said several papers and therein referred to. And your petitioner offers herewith a bond with good and sufficient surety conditioned according to law, for its entering in the Circuit Court of the United States for the District of Idaho, being the proper district, on the first day of its next

session, a copy of the records in this suit, and for paying all costs that may be awarded by said Court if said Court shall hold that this is wrongfully and improperly removed thereto; and your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept such surety bond, and to cause the record herein to to removed to the said Circuit Court of the United States for the District of Idaho, and he will ever pray.

AMERICAN BONDING COMPANY OF BALTIMORE,

By NEAL & KINYON,

Its Attorneys.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being duly sworn, deposes and says: That he is one of the attorneys for petitioner in above-entitled action; that he has read the above and foregoing petition for removal, knows the contents thereof, and that the facts stated thereon are true of his own knowledge except as to matters therein stated to be on information and belief, and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that the petitioner herein is absent from the county where the attorney resides and where the suit was filed.

B. F. NEAL.

Subscribed and sworn to before me this 4th day of February, 1905.

[Seal] W. L. CUDDY,
Clerk District Court,
By Otto F. Peterson,
Deputy.

[Endorsed]: (Omitting title and caption.) Filed Feby 4, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

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[Title and Caption Omitted.]

Bond on Removal.

State of Idaho,
County of Ada,—ss.

Know all men by these presents: That we, the American Bonding Company of Baltimore, Maryland, and The Flato Commission Company, a corporation organized and existing under the laws of the State of Nebraska, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are holden and stand firmly bound unto J. C. Mills, Jr., in the penal sum of three hundred ($300.00) dollars, for the payment whereof well and truly to be made unto the said J. C. Mills, Jr., his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns jointly and firmly by these presents.

Upon condition nevertheless, that whereas the said American Bonding Company, and The Flato Commission

Company have filed their petition in the District Court of the 3d Judicial District in and for Ada County, Idaho, for the removal of a certain cause therein pending, wherein the said J. C. Mills, Jr., is plaintiff and the said American Bonding Company and the Flato Commission Company are defendants, to the United States District Court, for the District of Idaho, Central Division.

Now, if the said American Bonding Company and the Flato Commission Company shall enter in the said District Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, we, the said American Bonding Company, and the Flato Commission Company, and The United States Fidelity and Guaranty Company have hereunto set our hands and seals this 4th day of February, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,
By NEAL & KINYON,
Attys.

[Seal]

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By CLAUDE H. ROBERTS,
Its Attorney in Fact.

[Endorsed]: Bond for Removal. Filed Feby. 4, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

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[Title and Caption Omitted.]

Alias Summons.

The State of Idaho Send Greetings to the Above Named Defendants.

You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of the Third Judicial District, State of Idaho, in and for the County of Ada, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or if served out of this county, but in this district, within twenty days; otherwise within forty days. The said action is brought to recover from the defendants the sum of $19,341.02 with interest thereon at the rate of 7 per cent per annum from June 17, 1903, being the amount due plaintiff, on a certain indemnity bond made and entered into between the defendants hereto, to indemnify and save harmless the said plaintiff, in certain acts as sheriff of Boise County, Idaho, in taking into his possession retaining and selling certain property mentioned in the complaint; for which sum this plaintiff is liable under the judgment of the District Court of the Third Judicial District of Idaho, in and for Canyon County, and the affirmation of the same by the Supreme Court of Idaho, in the case of Ralph Cowden vs J. C. Mills, Jr.; for the costs of this suit and for all proper relief; all of which

more fully appears in plaintiff's complaint filed herein, a copy of which is served herewith, hereby referred to, and made a part hereof.

And you are hereby notified, that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment for the sum demanded in the complaint, to wit: $19,341.02, with 7 per cent interest thereon from June 17, 1903, and costs of suit.

Given under my hand and the seal of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada this 4th day of Feb, in the year of our Lord one thousand nine hundred and five.

[Seal] W. L. CUDDY,
By Otto F. Peterson,
Deputy Clerk.

W. E. BORAH and
HARRY FISHER
Attorneys for Plaintiff.

[Endorsed]: Alias Summons. Filed Feby. 7, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. W. E. Borah and Harry Fisher, Attorneys for Plaintiff.

State of Idaho,
County of Ada,—ss.

I, C. C. Havird, sheriff of Ada County, Idaho, do hereby certify that I received the annexed alias summons on the 3d day of February, 1905; that after receiving the same I made inquiry and investigation and found that the Flato Commission Company is a foreign corporation organized and existing under and by virtue of the laws of the State

of Nebraska and that it has not filed its articles of incorporation in the State of Idaho or designated any person as agent upon whom to serve process of summons and has not complied with the laws of the State of Idaho relative to foreign corporations doing business in the State of Idaho; and I further ascertained that the said company or corporation, the Flato Commission Company, as such corporation transacted business in the Ada County, State of Idaho, and that upon the 7th day of February, 1905, I served the said Flato Commission Company, a corporation by serving William Cuddy, Auditor of Ada County, Idaho, an alias summons by delivering to him personally a true copy of this alias summons and a copy of the complaint herein.

C. C. HAVIRD,
Sheriff.

Boise City, Idaho, February 4, 1905.

Eleventh Judicial Day of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County. Present: Hon. GEO. H. STEWART, District Judge, and the Officers of the Court.

Whereupon, among others, the following proceedings were had, to wit:

J. C. MILLS,
vs.
AMERICAN BONDING CO. et al., } Civil Trial No. 25
and
WILLIAM FINNEY,
vs.
AMERICAN BONDING CO. et al., } Civil Trial No. 26.

Trial.

In these cases the motion of the defendant, the Flato Commission Co., to quash service of summons as to said Flato Commission Co. were sustained. Whereupon the defendant American Bonding Co. presented its motions for the removal of the cases to the United States Court. The Court declined to rule on the motions for removal till some action is taken in the matter by the United States Court. Counsel for the plaintiff duly excepted to the ruling of the Court in sustaining the motions of the defendant the Flato Commission Co to quash service of summons as to said Flato Commission Co.

WILLIAM FINNEY,

vs. Civil Trial No. 26.

AMERICAN BONDING CO et al.,

February 17th, 1905.

This cause came on for trial before the court and a jury, W. E. Borah Esqr., appearing as counsel for plaintiff, and Messrs Neal & Kinyon appearing as counsel for the defendant, the American Bonding Co.

Counsel for defendant at this time, after the case was called for trial, but before the jury was impanelled, objected to going to trial at this time and moved the court for a continuance of said cause till February 21, 1905, filing an affidavit in support of said motion. Whereupon the Court overruled the motion for continuance, to which ruling of the Court counsel for defendant excepted.

The clerk under the direction of the Court proceeded to draw from the jury box the names of twelve persons,

one at a time, written on separate slips of paper and folded, to serve as a jury in this cause. The following persons, whose nomes were drawn from the jury-box, were sworn on voir dire, examined, passed for cause and accepted by counsel for both plaintiff and defendant, and were sworn by the clerk to well and truly try said cause and a true verdict render therein, according to the law and the evidence, to wit: Frank McMillam, S. F. Russell, Green C. Patton, N. W. Johnson, George Stewart, James L. Yost, B. L. Pilgrim, G. W. Bredehoft, Frank Davisson, John M. Johnson, John Miller and W. Scott Anderson.

A statement of the cause was made to the jury by counsel for plaintiff.

John A. Tucker, William Finney, Ralph Cowden and Chas. F. Neal were called, sworn and examined as witnesses on the part of plaintiff, documentary and record evidence being also introduced by plaintiff, and here plaintiff rests.

Counsel for the defendant, the American Bonding Co., at this time moved the Court to instruct the jury to return a verdict in favor of the defendant, for the reason that the evidence introduced was not sufficient to warrant a verdict in favor of plaintiff, which motion was overruled by the Court, to which ruling of the court counsel for defendant excepted.

Defendant declining to introduce any evidence, the cause was submitted to the jury for decision.

The Court after instruction the jury in writing, placed them in the charge of M. E. Duncan, a bailiff first duly sworn, and they retired to deliberate upon their verdict.

Now on the same day came the jury into Court, counsel for the plaintiff and defendant being present, the jury was called, and all found present.

The Court asked the jury if they had agreed upon a verdict, and they through their foreman answered that they had, and presented to the court their written verdict in the words and figures following, to wit:

"*In the District Court of the Third Judicial District of State of Idaho, in and for Ada County.*

WILLIAM FINNEY,
Plaintiff,
vs.
AMERICAN BONDING CO. OF BALTIMORE, et al.,
Defendants.

We, the jury in the above-entitled case, find for the plaintiff and assess his damages against the American Bonding Company of Baltimore at the sum of $10,646.50.

JOHN M. JOHNSON,
Foreman."

The verdict was recorded in the presence of the jury and then read to them and they each affirmed the same.

State of Idaho,
County of Ada,—ss.

I, W. L. Cuddy, clerk of the District Court, in the Third Judicial District, State of Idaho, within and for the County of Ada, herby certify that the within and foregoing transcript, composed of —— pages, and containing the complaint and all exhibits thereto; the summons issued May

12, 1904, with return thereto, the summons issued February 4, 1905, with return thereto, and notice of petition for removal and bond for removal filed by the American Bonding Company of Baltimore under date of May 27, 1904, the demurrer to the complaint filed by the American Bonding Company of Baltimore on May 27th, 1904; order overruling demurrer of defendant, American Bonding Company; stipulation for answer as to American Bonding Company; answer of American Bonding Company, motion to quash service of summons, filed by the Flato Commission Company, filed January 31, 1905, with affidavits and exhibits thereto, attached; minutes of the Court, under date of February 4, 1905, and February 16, 1905, relating to the foregoing case, petition and bond for removal filed by the American Bonding Company on February 4, 1905, together with the endorsements of filing of the said several papers in this office, and that the within and foregoing are all of the files in the case of J. C. Mills, Jr., late Sheriff of Boise County, Idaho, vs. the American Bonding Company of Baltimore, et al., except, the petition for removal, by the American Bonding Company, filed under date of May 27, 1904, the plea of jurisdiction, to the Court, filed by the Flato Commission Company, defendant herein, in the Circuit Court of the United States, District of Idaho, and by that Court transmitted to the clerk of this Court and filed on September 22, 1904, together with the affidavits and other papers attached thereto.

And except the petition for removal filed February 16, 1905, for the American Bonding Company of Baltimore, also the Flato Commission Company on the same date,

and the joint bond for removal filed by both of said defendants, on said date, which last three, mentioned original papers are herewith transmitted and except all subpoenas issued in this action, and also all motions, affidavits and other papers, relating solely to the question of costs.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, the 13th day of March, A. D. 1905.

[Seal]

W. L. CUDDY,
Clerk of the District Court.
By Otto F. Peterson,
Deputy.

[Endorsed]: No. 249. U. S. District Court, Central Division, District of Idaho, J. C. Mills, Jr., vs. American Bonding Co. of Baltimore et al., Transcript. Filed March 13th, 1905. A. L. Richardson, Clerk.

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In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,
Plaintiff,
vs.
AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,
Defendants.

Petition for Removal of the American Bonding Company of Baltimore.

To the Honorable GEORGE H. STEWART, Judge of the District Court of the Third Judicial District of the State of Idaho, Within and for the County of Ada:

Your petitioner, The American Bonding Company, appearing specially herein for the sole purpose of this application only, respectfully shows unto the Court:

1st. That this defendant, the American Bonding Company of Baltimore, is a nonresident of the State in which said suit was brought, to wit, the said state of Idaho, and is a corporation organized under the laws of the State of Maryland.

2d. That the defendant, the Flato Commission Company, is a nonresident of the State in which said suit was brought, to wit, the said State of Idaho, and is a corporation organized under the laws of the State of Nebraska.

That service of summons has not been made upon said defendant, as will more fully appear by the affidavit of Charles F. Neal, hereto attached and made a part hereof.

3d. That palintiff was, at the time of bringing said suit, and still is, as these petitioners aver, a resident and citizen of the State of Idaho.

4th. That the matter and amount in dispute in said suit, exceeds exclusive of interest and costs, the sum of two thousand ($2,000.00) dollars.

5th. That said suit is of a civil nature, and that plaintiff prays in his complaint in said suit, for judgment in the sum of $19,341.02 against the American Bonding Company of Baltimore as surety, upon an alleged bond in the

sum of twenty thousand ($20,000.00) dollars, given to the plaintiff herein, as sheriff of Boise County, Idaho, under and by virtue of an affidavit on the foreclosure of a chattel mortgage given by one R. L. Shaw to the Flato Commission Company, defendant herein, and this defendant, the American Bonding Company of Baltimore, is the real party in interest, herein and the Flato Commission Company is, a this defendant believes and therefore alleges, wholly insolvent and therefore not a real party in interest herein.

6th. That the controversy in suit is wholly between citizens of different states, as aforesaid, and your petitioner offers herewith a good and sufficient surety for their entering in the Circuit Court of the United States for the District of Idaho, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make an order of removal of this suit to said Circuit Court of the United States, and to accept the said surety and bond and to cause the record herein to be removed into said Circuit Court of the United States for the District of Idaho, and your petitioner will ever pray.

THE AMERICAN BONDING COMPANY OF BALTIMORE,

By NEAL & KINYON,

Its Attorneys.

State of Idaho,
County of Ada,—ss.

Charles F. Neal, being first duly sworn, deposes and says: That he is an attorney and counselor of the Supreme Court of Idaho, and a member of the firm of Neal & Kinyon, who are the attorneys for the defendant in the above-entitled action, and has full authority to act for defendant in said matter; and that he has read the above and foregoing petition, and that the same is true and correct; that his knowledge of the matters set forth in said petition is based in part upon his personal knowledge, and upon letters and data furnished him by the defendant herein.

That none of the defendants herein are now in Ada County, Idaho, the place of residence of affiant.

CHARLES F. NEAL.

Subscribed and sworn to before me this 26th day of May, 1904.

[Seal] L. V. HOUSEL,
Notary Public.

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[Title and Caption Omitted.]

Affidavit of Charles F. Neal.

State of Idaho,
County of Ada,—ss.

Charles F. Neal, being first duly sworn, deposes and says that he is the Charles F. Neal upon whom service was made as the designated, authorized agent of the Flato Commission Company, defendant herein, in and for the State of Idaho.

He further states that he has never been appointed such agent, to the best of his knowledge and belief. Further, that he has made an examination of the records in the office of the Secretary of State in and for the State of Idaho; also in the office of the clerk of the District Court in and for the County of Ada, State of Idaho, and there is no designation of himself as the authorized agent of the Flato Commission Company at either of the above offices.

Further, that there is no designation of any authorized agent of the Flato Commission Company at either of the above offices.

He further states that he is not in any way authorized to accept or receive service, or do any act of thing for, or on behalf of defendant, the Flato Commission Company.

CHARLES F. NEAL.

Subscribed and sworn to before me this 26th day of May, A. D. 1904.

[Seal] L. V. HOUSEL,
Notary Public.

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[Title and Caption Omitted.]

Plea of Jurisdiction.

The defendant, the Flato Commission Company above named, specially appearing under protest for the purpose of this plea and for no other, says that it is not a corpotion organized under the laws of the State of Idaho, nor citizen nor inhabitant of the said State of Idaho, nor does it reside therein, but that it is a corporation organized under the laws of the State of Nebraska and an inhabitant of the State of Nebraska and residing at South Omaha in the

District of Nebraska where its corporate meetings are held and its corporate business transacted, which said facts appear upon the face of the petition herein.

That it has not and never has had a resident agent in the State of Idaho as provided by page 2653 of the Revised Statutes of Idaho 1887 (page 2162, Second Code of 1901) as will more fully appear by the affidavit of Charles F. Neal of Boise, Idaho, which is hereto attached and made a part hereof, marked Exhibit "A" and by affidavit of James C. Dahlman Secretary and Manager of this defendant corportion, residence South Omaha, Nebraska, which said affidavit is hereto attached and made a part hereof and marked Exhibit "B."

Further, that Charles F. Neal upon whom the pretended service of summons was made in this cause is not and never has been the agent or representative of this defendant in any matter whatever, and that this defendant has never at any time in the past appointed, and has now no agent upon whom service of summons can be had within the State of Idaho, as will more fully appear by the affidavit of the said Charles F. Neal which is hereto attached and marked Exhibit "A" and made a part hereof, and by the affidavit of James C. Dahlman, secretary and general manager of defendant, Flato Commission Company, which affidavit is hereto attached marked Exhibit "B"and made a part hereof, and to which affidavit reference is made.

Wherefore, insisting upon its exemption from suit in this court it shows that not in this court, but in the District

Court of the United States for the District of Nebraska has jurisdiction in the premises.

FLATO COMMISSION COMPANY,
By HAWLEY, PUCKETT & HAWLEY,
Its Attorney Specially Appearing for the Purpose of this Plea Only.

State of Idaho,
County of Ada,—ss.

James H. Hawley, being first duly sworn, deposes and says that he in an attorney and counsel of the Supreme Court of Idaho and of this Court, and a member of the firm of Hawley, Puckett & Hawley who are the attorneys for the defendant in the above-entitled action and has full power to act for defendant in said matter; that he has read the above and foregoing plea to jurisdiction and that the same is true and correct; that his knowledge of the matters set forth in said petition is based in part on his own personal knowledge and upon letters and data furnished him by the defendant herein; that none of the defendants herein are now in Ada County, Idaho, the place of residence of affiant.

JAMES H. HAWLEY

Subscribed and sworn to before me this 10th day of September, 1904.

ADAMS,
Notary Public.

I hereby certify that in my opinion the foregoing plea

to the jurisdiction of the court is well founded in point of law.

HAWLEY, PUCKETT & HAWLEY,
Counsel for Defendant, Flato Commission Company.

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[Title and Caption Omitted.]

Affidavit of Charles F. Neal and James C. Dahlman Attached to Plea of Jurisdiction of Flato Commission Company.

Filed in Case No. ——. U. S. Circuit Court, District of Idaho, Sept. 12, 1904.

State of Idaho,
County of Ada,—ss.

Charles F. Neal, being first duly sworn, deposes and says that he is the Charles F. Neal, upon whom service was made as the designated, authorized agent of the Flato Commission Company defendant herein, in and for the State of Idaho,

He further states that he has never been appointed such agent, to the best of his knowledge and belief. Further, that he has made an examination of the records in the office of the Secretary of State in and for the State of Idaho; also in the office of the Clerk of the District Court in and for the County of Ada, State of Idaho, and there is no designation of himself as the authorized agent of the Flato Commission Company at either of the above offices.

Further, that there is no designation of any authorized agent of the Flato Commission Company at either of the above offices.

He further states that he is not in any way authorized

to accept or receive service, or do any act of thing for, or on behalf of, defendant, the Flato Commission Company.

[Seal] CHARLES F. NEAL.

Subscribed in my presence and sworn to before me this 5th day of Sept., 1904.

[Seal] L. V. HOUSEL,
Notary Public.

State of Nebraska,
County of Douglas,—ss.

James C. Dahlman, being first duly sworn, deposes and says that he is and has been for five years last past the duly authorized and acting Secretary and for two years and five months the Manager of the Flato Commission Company, a Nebraska corporation with its principal office at South Omaha, Nebraska.

He further states that he is the officer who has charge of the books and papers, and cares for the correspondence of the said Flato Commission Co., defendant herein, that he knows of his own knowledge that Charles F. Neal of Boise, Idaho, upon whom the purported service of summons was made in the above-entitled action as the duly authorized agent of defendant, the Flato Commission Company, is not and never has been the authorized agent of defendant, the Flato Commission Company, and never has been authorized to do any business whatever for the said company as its agent.

Further that the Flato Commission Company, defendants herein, has not and never has had an authorized stat-

utory agent in the State of Idaho as provided for in page 2653 Revised Statutes of 1887 of Idaho.

JAMES C. DAHLMAN

Subscribed in my presence and sworn to before me this 18th day of August, 1904.

J. F. POWERS,
Notary Public.

Service of copy of above and foregoing admitted this 12th day of September, 1904

W. E. BORAH.

Endorsement on plea to jurisdiction, and foregoing affidavits which were filed as one paper as follows: (Omitting title and caption.) No. ——. U. S. Circuit Court, Central Division, District of Idaho, Plea to Jurisdiction of Flato Commission Company. Filed Sept. 12, 1904. A. L. Richardson, Clerk. Filed Sep. 22d, 1904. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being first duly sworn, deposes and says: That the foregoing, comprising 9 pages, contain true and correct copies of the petition for removal, filed by the American Bonding Company of Baltimore filed May 27, 1904, in this action, that the foregoing copy of plea of jurisdiction to the Court, filed by the Flato Commission Company, the defendant herein, on Spe. 12, 1904, in the Circuit Court of the United States, District of Idaho, and by that Court transmitted to and filed in the District Court of the Third Judicial District in and for Ada County, on

Sep. 12, 1904, as also the foregoing copies of affidavits by Charles F. Neal and James C. Dahlman which were attached to the aforesaid plea to jurisdiction are each, true and correct and complete copies of the original files in said cause as shown by the office files in my office, made at and prior to the filing of the before mentioned papers and by me compared therewith.

Affiant further states that he has made diligent search and inquiry in his own office and in the office of the clerk of the District Court, in the office of W. E. Borah and elsewhere and that he is unable to find the original papers above mentioned, or any part thereof.

B. F. NEAL.

Subscribed and sworn to before me this 13th day of March, A. D. 1905.

[Seal] W. L. CUDDY,
Clerk.
By Otto F. Peterson,
Deputy.

[Endorsed]: No. 249. U. S. Circuit Court, Central Division, District of Idaho. J. C. Mills, vs. American Bonding Company of Baltimore, et al. Showing on Transcript. Filed March 13, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Petition for Removal of the American Bonding Company of Baltimore.

Your petitioner, the American Bonding Company of Baltimore, respectfully shows to this Honorable Court that

it is one of the defendants in this action, which is of a civil nature, and the matter and amount in dispute in this cause exceeds in value the sum of two thousand dollars, exclusive of interest and fees and (2) that the controversy herein is between citizens of different states; that the plaintiff was at the time of the beginning of this action, and still is, a citizen of the State of Idaho, residing in Boise County in said State; that your petitioner, the American Bonding Company of Baltimore, was, at the commencement of this action, and still is, a citizen of the State of Maryland, and of no other state, residing at Baltimore City in said State; (3) that the Flato Commission Company, defendant herein, is a corporation, and was at the commencement of this suit, and still is, a citizen of the State of Nebraska and of no other State, residing at South Omaha in said State; and that your petitioner, the American Bonding Company of Baltimore, desires to remove this suit before the trial thereof, into the next Circuit Court of the United States to be held in the District of Idaho, Central Division.

II.

Your petitioner, the American Bonding Company of Baltimore, heretofore on the 27th day of May, 1904, and within the time to plead, filed its petition for removal of this cause into the Circuit Court of the United States for the District of Idaho, which petition was denied by the Circuit Court of the United States for the District of Idaho on or about the 13th day of September, 1904, that being a day of the next succeeding term of the Circuit Court, and said cause was by said Circuit Court remanded

to the District Court in and for Ada County, Idaho, for the reason that the Flato Commission Company, codefendant herein, was a party in said cause and had not joined in asking for the removal of the same and had been regularly served with summons as shown by the records of said caurt; that thereafter on the 1st day of February, 1905, the Flato Commission Company appeared specially in this court; that thereafter on the 1st day of February, 1905, of this court over it and filed its motion to quash the service of summons which had been theretofore returned as made upon Charles F. Neal statutory agent of defendant Flato Commission Company, and which return of service appeared of record at the time of remanding of said cause from the Circuit Court of the United States as aforesaid, which said motion to quash was on the 4th day of February, 1904, argued to this Court and sustained.

That immediately after the quashing of summons as against defendant, the Flato Commission Company, plaintiff herein in open Court directed that alias summons issue for service upon said defendant the Flato Commission Company, and immediately thereafter and prior to the issuance of such alias summons, this defendant, the American Bonding Company of Baltimore, filed its petition for removal of this cause in the Circuit Court of the United States for the district of Idaho, which petition was as aforesaid filed on the 4th day of February 1905, and was argued before the Hon. James H. Beatty, Judge of the Circuit Court of the United States, District of Idaho, on the 7th day of February, 1905, and said cause was recourt show that there was process outstanding at the time

manded for the reason that the proceedings before that of hearing as against the defendant, the Flato Commission Company.

III.

Further that on the said 7th day of February, 1905, the alias summons as aforesaid issued out of this court on the 4th day of February, 1905, for service upon defendant the Flato Commission Company, was served upon said defendant under and by virtue of the provisions of section 4144 of the Revised Statutes of Idaho and acts amendatory thereof by delivering a true copy of alias summons and copy of complaint herein to William Cuddy, Auditor of Ada County, Idaho.

That this defendant, the American Bonding Company of Baltimore, has taken no other or further steps herein of any kind whatever except only the removal procedings herein referred to, since the quashing of summons aforesaid on the 4th day of February, 1905, as to defendant the Flato Commission Company, and no action whatever in said cause since it came to the knowledge of said American Bonding Company of Baltimore that service of summons as aforesaid had been had upon the Flato Commission Company, except only as to object to the jurisdiction of this court to try this cause prior to the expiration of the time in which defendant the Flato Commission Company was by law required to plead herein.

Your petitioner offers herewith a bond with good and sufficient surety conditioned according to law, for its entering in the Circuit Court of the United States for the District of Idaho, a copy of the records in this suit, and

for paying all costs that may be awarded by said Court if said Court shall hold that this suit is wrongfully and improperly removed thereto; and your petitioner prays this Honorable Court to proceed no further herein, except to make an order of removal required by law, and to accept such surety bond and to cause the records herein to be removed to said Circuit Court of the United States for the District of Idaho, and he will ever pray.

AMERICAN BONDING COMPANY OF BALTIMORE,

By NEAL & KINYON,
Its Attorneys.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being duly sworn, deposes and says: That he is one of the attorneys for petitioner in above-entitled action; that he has read the above and foregoing petition for removal, knows the contents thereof, and that the facts stated therein are true of his own knowledge except as to matters therein states to be on information and belief and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that the petitioner herein is absent from the county where the attorney resides and where the suit was filed.

B. F. NEAL.

Subscribed and sworn to before me this 13th day of February, 1905.

[Seal] L. V. HOUSEL,
Notary Public.

[Endorsed]: Petition for Removal, Filed Feb. 16, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy Clerk. Filed March 13, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Petition for Removal of the Flato Commission Company.

Your petitioner, the Flato Commission Company, respectfully shows to this Honorable Court that it is one of the defendants in this action, which is of a civil nature, and the matter and amount in dispute in this cause exceeds in value the sum of two thousand dollars, exclusive of interest and fees; and (2) that the controversy herein is between citizens of different states; that the plaintiff was at the time of the beginning of this action and still is a citizen of the State of Idaho, residing in Boise County, in said State. That your petitioner, the Flato Commission Company is a corporation and was at the commencement of this action and still is, a citizen of the State of Nebraska and of no other State, residing at South Omaha, in said State. That the American Bonding Company of Baltimore, defendant herein, is a corporation, and was at the commencement of this suit, and still is, a citizen of the State of Maryland, residing at Baltimore in said State, and that your petitioner, the Flato Commission Company, desires to remove this suit before the trial thereof into the next Circuit Court of the United States to be held in the District of Idaho.

II.

And your petitioner offers herewith good and sufficient surety for his entering in the Circuit Court of the United

States for the District of Idaho on the first day of its next session, a copy of the records in this suit and for paying all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully and improperly removed thereto.

In support of this its application for removal petitioner attaches hereto and makes a part hereof a copy of summons served upon William Cuddy, Auditor of Ada County, Idaho, with affidavit of said Cuddy as to service made.

And your petitioner therefore prays that said surety and bond may be accepted; that this suit may be removed in the next Circuit Court of the United States to be held in the District of Idaho pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had herein in this court, and it will ever pray.

FLATO COMMISSION COMPANY,
By HAWLEY, PUCKETT & HAWLEY,
Its Attorneys.

State of Idaho,
County of Ada,—ss.

Jesse Hawley, being first duly sworn, deposes and says that he is one of the attorneys for petitioner in above-entitled action, that he has read the above and foregoing petition for removal, knows the contents thereof and that the facts therein stated are true of his own knowledge except as to matters therein stated to be on information and belief, and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that peti-

tioner herein is absent from the county where the attorney resides and where the suit was filed.

JESS HAWLEY

Subscribed and sworn to before me this 13th day of February, 1905.

W. L. CUDDY,
Clerk District Court.
By Otto F. Peterson,
Deputy.

[Endorsed]: Petition for Removal. Filed Feb. 16, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. Filed March 13, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Removal Bond.

Know all men by these presents: That we, the American Bonding Company of Baltimore, Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and the Flato Commission Company, a corporation organized under and by virtue of the laws of the State of Nebraska, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are holden and firmly bound unto J. C. Mills, Jr., in the penal sums of five hundred ($500.00) dollars, for the payment of which well and truly to be made unto the said J. C. Mills, Jr., his heirs, representatives and assigns, we bind ourselves and each of our representatives and assigns, jointly and severally by these presents.

Upon the condition nevertheless, that whereas, the said American Bonding Company of Baltimore, and the said Flato Commission Company, have filed their respective petitions, in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, for the removal of a certain action therein, pending, wherein the said J. C. Mills, Jr., is plaintiff and the said American Bonding Company of Baltimore and the said Flato Commission Company are defendants, to the Circuit Court of the United States for the District of Idaho.

Now, therefore, if the said American Bonding Company of Baltimore, and the said Flato Commission Company, shall enter in the said Circuit Court of the United States, on the first day of the next succeeding term a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, we the said American Bonding Company of Baltimore, the said Flato Commission Company and the United States Fidelity and Guaranty Company have hereunto set their hands and seals this 16th day of February, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,

By NEAL & KINYON,

Its Attorneys.

FLATO COMMISSION COMPANY,
By HAWLEY, PUCKETT & HAWLEY,
Its Attorneys.

[Seal]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By CLAUDE H. ROBERTS,
Its Attorney in Fact.

[Endorsed]: Removal Bond. Filed Feb. 16th, 1905. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. Filed March 13, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Affidavit of W. E. Borah.

State of Idaho,
County of Ada,—ss.

W. E. Borah, being duly sworn, deposes and says: That he is one of the attorneys for the above-named plaintiff. That the time for the defendant, the American Bonding Company of Baltimore, to appear and answer under the summons in the above cause was May 27, 1904, and at said time the said American Bonding Company appeared and filed its general demurrer in said Court. That thereafter the American Bonding Company through its attorneys and on or about November 26, 1904, appeared in said court and argued the demurrer to the complaint, and that thereafter the Court rendered a written opinion upon said demurrer and overruled the same on or about November 26, 1904. That at the time of said appearance and argument

of said demurrer no objection was raised to the jurisdiction of said State Court. That after overruling said demurrer and without any objection upon the part of the American Bonding Company, said company through its attorneys entered into a written stipulation for time in which to answer and thereafter having taken the time covered by said stipulation filed their answer upon December 12, 1904, in said Court and did not object at said time to the jurisdiction of the court or file said answer under protest. That thereafter and on or about the 25th day of January, 1905, counsel for both plaintiff and defendant being present in said court, the cause was by consent of both parties through their counsel set for trial for Feb. 4, 1905, and the said case was set without any protest upon the part of the American Bonding Company or objection to the jurisdiction of said court. That thereafter and on or about Feb. 71, 1905, the cause proceeded to trial before the court and a jury and verdict in favor of the plaintiff resulted and judgment was duly entered. That notice of motion for new trial has been served and a bond for stay of execution has been duly filed by the American Bonding Company.

Affiant further states with reference to the Flato Commission Company that said Flato Commission Company was first served by serving Charles E. Neal as statutory agent of the Flato Commission Company, such service being made on the 17th day of May, 1904. That thereafter and on the 31st day of January, 1905, the Flato Commission Company appeared by its counsel and moved to quash the summons on the ground that said Neal was not the statutory agent of the Flato Commission Company. That

immediately upon said summons being quashed an alias summons was issued and the same was served upon the Flato Commission Company upon the 7th day of February, 1905, by serving the auditor of Ada County, Idaho, as provided by the statutes of Idaho. That the said Flato Commission Company has never made any appearance by demurrer or answer but has defaulted and that default was duly taken against said Flato Commission Company in the State Court upon the 6th day of March, 1905, and judgment duly entered upon said default upon the 7th day of March, 1905. And further affiant saith not.

W. E. BORAH.

Subscribed and sworn to before me this 13th day of March, 1905.

[Seal] JOHN J. BLAKE,
Notary Public.

[Endorsed]: Affidavit of W. E. Borah. Filed March 13, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Motion to Remand.

Comes now the plaintiff above named and moves that the above cause be remanded to the District Court of the Third Judicial District of the State of Idaho in and for Ada County, and for grounds of motion says:

1. That it appears from the files and records in this case and from the alleged petition for removal that no ground exists for the removal of said cause from the District Court of the Third Judicial District of the State of Idaho in and for Ada County to the above court.

2. It appears from the alleged petition for removal and the petition and files and affidavit in this case that this court has no jurisdiction of the above cause and that said suit was improperly removed to this court.

3. That it appears that all the defendants did not join in the petition for removal as required by the statutes and laws relative to the removal of causes from the State Court to the Federal Court.

4. That this court has no jurisdiction of this cause.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: Motion to Remand. Filed March 13, 1905. A. L. Richardson, Clerk.

[Title and Caption Omitted.]

Certificate of District Judge.

State of Idaho,
County of Ada,—ss.

I, George H. Stewart, Judge of the District Court of the Third Judicial District of the State of Idaho in and for Ada county, do hereby certify that the answer in the above-entitled cause was filed by the defendant, the American Bonding Company on December 12, 1904, prior to which time said company had appeared by its attorney and argued a demurrer which was overruled. That upon the 25th day of January, 1905, in open court plaintiff and defendant, the American Bonding Company, being present by their attorneys said cause was called for setting and was set for trial by consent of both parties for February 4, 1905, and that no objection or protest was made at said

time as to the jurisdiction of the Court or against proceeding to trial in the State Court. That prior to the time the present petition for removal was filed, the defendant, the American Bonding Company, had appeared by counsel and had consented that the cause be set for trial and had itself called for a jury in said case.

GEO. H. STEWART,
District Judge.

[Endorsed]: No. 249. Certificate of District Judge. Filed March 13, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Affidavit of B. F. Neal.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being first duly sworn, deposes and says that he is one of counsel for the American Bonding Company, one of the defendants in the above-entitled action. That he is the counsel who prepared and filed the various papers for removal heretofore filed in this case, and is the B. F. Neal who argued the demurrer filed by said defendant to the complaint herein on Sep. 22, 1904, before the Hon. Geo. H. Stewart, Judge of the District Court in and for Ada County, Idaho.

Affiant further says that on the date of the argument of said demurrer this affiant orally objected to the jurisdiction of said court to hear said demurrer for the reason that there was in the files pleas to jurisdiction of the Court over the Flato Commission Company and unacted upon,

which said pleas were founded upon the alleged ground that no service of summons as required by law had been had upon said defendant, and that the purported service was void and wholly unauthorized. That this defendant at such time and place and prior to the beginning of the argument on said demurrer objected to being required to argue said demurrer for the reason that if the Flato Commission Company was not a party to the suit brought in by due and proper service of summons that it was an election to proceed against the American Bonding Company only to require at that time arguments and rulings upon said demurrer, and that said cause was lawfully removed to the Circuit Court of the United States, District of Idaho. as to American Bonding Company. That notwithstanding affiant's said objection on behalf of American Bonding Company the Court required that the arguments on said demurrer proceed and thereafter did rule upon said demurrer, overruling the same.

Affiant further says that thereafter in due and proper time the American Bonding Company filed its answer in said cause and that on the first day of January, A. D. 1905, term of District Court in and for the Third Judicial District, State of Idaho for Ada County, upon the calling of the docket this cause was set for hearing being No. —— in regular order of the jury cases for trial.

Affiant further says that at said time nor any other time, did the affiant demand a jury. He further states that he did decline to waive a jury on behalf of the American Bonding Company.

Affiant further says that said causes were not at the

opening of said Court set for any date certain but were set for trial in their order as the civil jury cases appeared upon the civil trial docket and that they were on said docket cases Nos. 25 and 26 and were civil jury civil cases Nos. ——— and ———.

Affiant further says that on February 1st, thereafter and before the trial of any of the civil jury cases the case of William Finney vs. American Bonding Company was set for trial to follow the Fred Bond and Jennie Daly murder cases, which date was supposed to be about Feb. 4, 1905. That said date was set without the consent of affiant or his co-counsel who represented the defendant, American Bonding Company. That on said February 4th an application to quash service of summons which had been theretofore filed by the Flato Commission Company was sustained and then and thereby defendant the American Bonding Company, became and was the only party defendant to said action. That affiant acting for said American Bonding Company then and there in open court immediately after the discharge of the said Flato Commission Company as a party defendant renewed its former application to have said case removed to the United States Circuit Court for the District of Idaho, as will more fully appear by the transcript filed herewith.

Affiant further says that the Hon. George H. Stewart declined to permit the papers to be removed to the Federal Court but stated that defendant, the American Bonding Company might take a transcript of the papers and have the matter heard before Beatty. That thereafter by agreement between counsel for plaintiff and affiant said cause

was heard on the original papers in the Federal Court before the Hon. James H. Beatty, and that said cause was remanded by said court for the reason that the record then before the said Court showed that there was a summons outstanding against the defendant, the Flato Commission Company, and that it had been duly served by serving upon W. L. Cuddy, Auditor of Ada County, Idaho as by statute provided, and said Flato Commission Company was not a party to said removal petition, and for these reasons said Beatty caused said action to be remanded to the state court as not removable.

Affiant further states that on the morning of February 9th at the hour of opening court affiant was present in court when the court announced that he would set the Finney and Mills cases against the American Bonding Company, said cases being the actions at bar, to follow the Jennie Daly case, and such entry was duly made of record in the journals of said Court. That at said time in open court this affiant orally objects to the jurisdiction of said court to try this cause as to defendant, the American Bonding Company, at a date prior to the time when the defendant, the Flato Commission Company, would be compelled to answer or plead to the petitioner herein, and for the further reason that as to defendant, the American Bonding Company, said cause had been lawfully removed to the Federal Court.

Affiant further states that he relied upon the statement of the said Court then and there made that if tried this case would not be tried until after the trial of the case of the State of Idaho vs. Jennie Daly.

Affiant further says that he was notified by telephone on the night of February 15th at about eight o'clock P. M. that the case of Mills against the American Bonding Company, et al would be set for 10 o'clock February 16th, and the case of Finney vs. American Bonding Company, et al., would immediately follow that. Affiant further says that immediately upon the opening of court on the morning of February 16, 1905, he made his objections, which he then and there asked the reporter to take down in writing and which are filed herewith, objecting to the jurisdiction of said court to try either the Mills or Finney case at said time or at all, for the reason that said cause was not at issue as to the Flato Commission Company; for the reason that said cause had been lawfully removed as to the American Bonding Company, and for other reasons set out in said objections as shown by the reporter's transcript herewith.

Affiant further says that at every stage of the trial of each of the above cases in the said Court this affiant and his co-counsel objected to the jurisdiction of the said Court to try these cases for the reason that they had been removed; for the reason that cause was not at issue as to the defendant Flato Commission Company; for the reason that cause was taken up out of its order for trial and without proper notice to counsel for defendant, and for other reasons which are set out more specifically in the reporter's transcript of said evidence.

Further affiant saith not.

B. F. NEAL.

Subscribed and sworn to before me this 18th day of March, 1905.

[Seal] L. V. HOUSEL.
Notary Public.

[Endorsed]: No. 249. Affidavit of B. F. Neal. Filed March 22d, 1905. A. L. Richardson, Clerk.

Service of within affidavit with copy admitted without waiver of any rights, March 22, 1905.

W. E. BORAH,
Attorney for Plaintiff.

[Title and Caption Omitted.]

Proceedings Before District Court.

Be it remembered that on the 16th day of February, 1905, on the trial of the above-entitled cause before the Hon. Geo. H. Stewart, Judge of the Third Judicial District of the State of Idaho, with a jury, the following proceedings were had and entered of record, to wit:

Before the impaneling of the jury the defendant made the following motion:

Mr. NEAL.—The defendant, the American Bonding Co., objects to going to trial at this time, or at all, in this Court, for the reason that the cause has been legally removed to the Circuit Court of the United States for the District of Idaho. This defendant objects to going to trial for the further reason that the time in which the defendant, The Flato Commission Co., is by law required to answer, has not expired. And for the further reason that this cause was set for trial to follow the case of the State of Idaho against Jennie Daly, and is being taken up out of

its turn without notice prior to last night about the hour of 8 o'clock that it would be taken up at this time. That at this time the defendant, the American Bonding Co., is unable to get witnesses here who are necessary for the defense, and cannot do so within less than three days' time.

That ——— ———, of Grand Island, Nebraska, who was a witness at the trial of the cases of Ralph Cowden against this plaintiff, in the District Court of the Third Judicial District in and for Canyon County, Idaho, would, if present, swear that Ralph Cowden, not long prior to the time of the purchase of the sheep in controversy by said Cowden, that they had been mortgaged by one R. L. Shaw to the Flato Commission Co., of South Omaha, Nebraska, and that said mortgage was then and there wholly unpaid. That the defendant, the American Bonding Company, is unable to get such witness here at this time, and cannot do so short of three days' time from this date, as he is now at Grand Island, Nebraska, but could get him here inside of three days from this date. That said witness is a necessary witness and is the only witness except ——— ———, of Wood River, Nebraska, by whom defendant, the American Bonding Co, can prove the facts above set forth. That the defendant, the American Bonding Co. had arranged for said——— ——— of Grand Island, Nebraska, to be present at the trial of this case. That his testimony is material, and as this affiant believes, the defendant, the American Bonding Co. cannot safely go to trial in this case without the evidence of said witness. That ——— ——— of Wood River, Nebraska, would testify to the same facts mentioned hereinabove as would

witness ———— ————, of Grand Island, Nebraska. That if this cause be continued to a date at least three days later than this date, affiant will be able to procure the presence of the two witnesses mentioned on behalf of the defendant, the American Bonding Co. That affiant heretofore notified witnesses in question that this case would follow the two criminal cases known as the Daly cases, and that he would notify them in time to be here for such trial. That affiant sent notice as quick as he knew this case was likely to be advanced but there is not time and cannot be time for them to be present at this trial prior to three days from this time. That affiant knows of no other witnesses by whom the facts which can be proven by these witnesses, can be shown in favor of the defendant, the American Bonding Co.

Write that as sworn to by B. F. Neal.

The American Bonding Co., also objects to going to trial at this time for the reason that the time in which the Flato Commission Co., is required to answer in this case, has not expired and will not expire until the 17th day of February, 1905. That the petition of the American Bonding Co., in this case is that but of mere surety, its codefendant, the Flato Commission Co., being the principal in this suit. That in justice and in right, this defendant should be permitted leave for stay of this suit until such time as the Flato Commission Company is required to answer herein. This defendant objects to any procedings whatever in this case.

The COURT.—I would like to ask you a question, Mr. Neal, in this connection; on the 25th day of January this

case was set for trial on February 4th, at which time you filed a petition to remove the case to the Federal Court, as you have this morning?

Mr. NEAL.—Yes, sir.

The COURT.—Were those witnesses present upon that day?

Mr. NEAL.—They were not present, but arrangements had been made to have them here any time by wire.

The COURT.—Also, the cause was postponed at that time, not because of the absence of these witnesses, but because of the petition for removal; that was the reason it was not tried on that day?

Mr. NEAL.—Well, as I recollect the matter there was other cases on that particular date.

The COURT.—When I called your case you filed your petition to remove it to the Federal Court?

Mr. NEAL.—That is true. I made no other showing.

The COURT.—The motions are overruled.

To which ruling and action of the Court, defendant, by counsel then and there duly excepted.

State of Idaho,
County of Ada,—ss.

W. L. Phelps, being first duly sworn, deposes and says: That he is the official stenographer of the Third Judicial District of the State of Idaho. That he took an accurate report of the proceedings in the above-entitled cause in shorthand, and that the above is a true and correct copy of the same as to matters and things therein contained.

W. L. PHELPS

Subscribed and sworn to before me this 22d day of March, 1905.

[Seal] W. L. CUDDY,
Clerk.
By Otto F. Peterson,
Deputy.

March 22d, 1905.

Service of within affidavit by copy admitted without waiver of any rights.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Proceedings Before District Court. Filed March 22d, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Supplemental Petition.

Comes the American Bonding Company, petitioner herein, and for its additional and supplemental petition for removal herein, adopts, reaffirms and reiterates, each and every statement of its petition for removal filed in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on the 16th day of February, 1905, and in this Court on the 13th day of March, 1905, as well as also all procedings therein referred to and made a part thereof, and for its supplemental petition herein further says:

I.

That after the due filing of its petition and bond for removal on said 16th day of February, 1905, and after the

due filing of the petition and bond for removal filed herein by the Flato Commission Company, the codefendant herein with this petitioner, and the due calling of the attention of the said Court, which was then and there in session, to said petitions and bonds, and the request on the part of each of said defendants that said District Court, in and for said Ada County, enter its order, that it proceed no further and that it enter its order that this petitioner and its codefendant, the said Flato Commission Company, had lawfully removed said cause to the Circuit Court of the United States for the District of Idaho, the said Court did then and there refuse to enter said order or any part thereof, and did notwithstanding said proceedings so as aforesaid taken by petitioner and its codefendant, the Flato Commission Company, order that said cause proceed to immediate trial as to this petitioner only, whereupon this petitioner filed its objections thereto, on the ground that said cause had been on that date lawfully removed to this court, and further objected and protested against said court taking any proceeding whatever therein, and demanded that said cause be continued until such time as its codefendant, the Flato Commission Company, was by law required to plead and answer. That nothwithstanding said objections and protests of this petitioner, said court at the request of plaintiff in this cause did proceed to empanel a jury and try this cause, notwithstanding the same was not at issue as to its codefendant, the Flato Commission Company, and notwithstanding the said Flato Commission Company had not answered or plead to said complaint, and notwithstanding the time in which said Flato

Commission Company was required by law to answer or plead had not so expired, and did so try the same on the 17th day of February, 1905, over the said protests and objections of your petitioner as aforesaid, made and caused to be duly entered of record, and did not submit said cause to said jury as aforesaid against the said protests and objections of this petitioner so as aforesaid made and caused to be entered of record and caused said action to be tried and verdict found as to this defendant only; that then and thereby, by the acts of the said plaintiff, done as aforesaid over the protests and objections of this petitioner so as aforesaid made and entered, and with full knowledge of the fact that as to the Flato Commission Company, defendant herein as aforesaid, the time to answer or plead had not expired, the said plaintiff elected to proceed against this defendant separately, and then and thereby there was by the act of said plaintiff a severance of said cause of action as to the said defendants, and each of them, and then and thereby for the first time, this petitioner had a separate right of removal from the right of its codefendant herein; and said cause was for the first time removable as to this petitioner, without the joint and concurrent action of its codefendant herein, which facts more fully appear by the records filed herein, as well as by the affidavits in support of petitioner filed by this petitioner herein.

Wherefore, petitioner prays that this Court take jurisdiction of this cause and issue its order to the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, that it proceed no further herein,

and that all proceedings in said court be stayed as of this date until further order of this court.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Petitioner.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being first duly sworn, deposes and says that he is one of the attorneys for petitioner in the above-entitled action; that he had read the above and foregoing supplemental petition for removal and knows the contents thereof; that the facts stated therein are true of his own knowledge, except as to matters therein stated to be on information and belief, and as to those matters he believes them to be true. That affiant makes this affidavit for the reason that petitioner is a corporation and is absent from the county where the attorney resides and where the suit is filed.

B. F. NEAL.

Subscribed and sworn to before me this 23d day of March, 1905.

[Seal] L. V. HOUSEL,
Notary Public.

[Endorsed]: No. 249. Supplemental Petition. Filed March 23, 1905. A. L. Richardson, Clerk.

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At a Stated Term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Tuesday, the 4th day of April, 1905. Present: Hon. JAS. H. BEATTY, Judge.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,

vs. No. 249.

AMERICAN BONDING COMPANY OF BALTIMORE et al.,

Order Denying Motion to Remand.

On this day was announced the decision of the Court upon the motion to remand this cause heretofore argued and submitted to the effect that said motion be denied. To which ruling plaintiff by his counsel excepted.

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[Title and Caption Omitted.]

Order Extending Time.

It is hereby ordered and adjudged that the plaintiff in the above-entitled cause have sixty days after the trial of the above cause in which to prepare and file his bill of exceptions in the above-entitled cause, and it is further ordered that an exception is hereby allowed to plaintiff in overruling the plaintiff's motion to remand the above cause to the State court.

JAS. H. BEATTY.

[Endorsed]: No. 249. Order Extending Time. Filed April 5, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Demurrer of Defendant American Bonding Company.

Comes now the defendant, the American Bonding Company, and demurrers to the complaint filed herein, and for cause of demurrer says:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for American Bonding Company.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Defendant.

Due service of the foregoing demurrer with copy admitted this 5th day of April, 1905, without any waiver of right to file demurrer.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Demurrer of Defendant American Bonding Co. Filed April 5th, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Demurrer of Defendant Flato Commission Company.

Comes now the defendant, the Flato Commission Company, and demurs to the complaint filed herein, and for cause of demurrer says:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Defendant, Flato Commission Company.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Defendant.

Due service of the foregoing demurrer with copy admitted this 5th day of April, 1905, without waiver of right to file demurrer.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Demurrer of Defendant Flato Commission Co. Filed Apr. 15, 1905. A. L. Richardson, Clerk.

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At a Stated Term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Saturday the 8th day of April, 1905. Present: Hon.

JAS. H. BEATTY, Judge.

J. C. MILLS, JR., Sheriff, etc.,

vs. No. 249.

AMERICAN BONDING COMPANY OF BALTIMORE

Order Overruling Demurrers.

On this day was announced the decision of the Court, upon the separate demurrers of the defendants, the American Bonding Company of Baltimore and the Flato Commission Company. Ordered that said demurrers and each be and the same is hereby overruled, and ordered that the Flato Commission Company be given until the 15th inst to answer in said cause. An exception to the said ruling is allowed.

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[Title and Caption Omitted.]

Answer of Flato Commission Company.

Comes defendant, the Flato Commmission Company, and for its separate answer herein admits, alleges and denies as follows:

I.

Admits the allegations of paragraphs one and two of said complaint.

II.

Answering paragraph three this defednant admits that it did file with plaintiff as sheriff of Boise County, Idaho, an affidavit and notice in due form of law and as required by the statutes of the State of Idaho relative to the foreclosure of chattel mortgages, under the process of "notice and sale," admits the execution of a bond of which the copy annexed to said complaint is a substantial copy. Further answering said paragraph this defendant says that it has not information or belief sufficient to enable it to answer the other allegations of said paragraph three, to

wit, that under and by virtue of the aforesaid affidavit and notice delivered to said plaintiff as aforesaid by this defendant, plaintiff took possession of certain personal property, to wit, about 2,629 head of ewes, 1,645 lambs and 268 head of mixed yearlings, or any other number of ewes, lambs or mixed yearlings, branded as in said paragraph set out, or that all or any of said sheep were claimed by Ralph Cowden or by any other person as his separate and individual property, and therefore denies each and all of said allegations. And further alleges that if any sheep were taken by plaintiff by virtue of said writ, then they were the property of R. L. Shaw, and were the property described in the chattel mortgage referred to in said complaint as having been given by said R. L. Shaw to this answering defendant, which said mortgage was given for value, and without any design to hinder, delay or defraud creditor or creditors and was in good faith so executed by said Shaw.

III.

Answering paragraph four of said complaint this defendant admits the signing of the alleged bond herein mentioned, and further answering denies that said bond was made, executed and delivered for the purposes in said paragraph set out, to wit, in order that plaintiff might hold said sheep, retain possession of the same and make sale thereof to satisfy the mortgage of this defendant. Further answering said paragraph four this defendant alleges the facts as to the execution of said bond to be as follows: that when said affidavit and notice mentioned as aforesaid by plaintiff were delivered to plaintiff by this defendant

for service in the manner provided by law, to wit, by levy, advertisement and sale, the plaintiff declined to serve the same by levying and taking into his possession the personal property therein described, or do any other thing whatever by law of him required until he had first been indemnified by this defendant with an indemnity bond for the amount of and conditioned as in said paragraph four set out. That thereafter this defendant in order that it might have and receive at the hands of the said plaintiff, sheriff as aforesaid, the service and duty by him owing in the premises to this defendant, did on said sheriff's demand and refusal to act unless and until so indemnified procure to be executed and delivered to the plaintiff as sheriff aforesaid, a bond of indemnity conditioned in manner and form as aforesaid, required by said plaintiff, that is to say in said paragraph four set out. That said bond of indemnity was not voluntary but was coerced and extorted from said Flato Commission Company without authority of law and in violation of law and was so executed solely in order that said Flato Commission Company might require and have at the hands of plaintiff, as sheriff aforesaid, service and duty which he by law was required to render to this defendant upon the payment or tender of his lawful fees therefor, which fees were then and there tendered and paid, and said Flato Commission Company was entitled to said service without any other or further requirement or demand whatsoever on the part of said plaintiff, sheriff as aforesaid. That said bond was taken by said plaintiff as sheriff aforesaid under color of his office as sheriff as aforesaid, and is wholly unauthorized

by law and is wholly without consideration and is illegal and void, wherefore this defendant ought not to be charged and holden on the same.

IV.

Answering paragraph five this defendant denies that upon the execution and delivery of said bond of indemnity the plaintiff retained possession of any sheep, and denies that he had any sheep in his possession when said bond was executed and delivered, and denies that he sold any sheep other than the sheep mortgaged and which were described in the mortgage, and in the process, placed in his hands in said foreclosure proceedings at the request of this defendant, or at all, and denies that this defendant, or any other person in his behalf requested the sale of any sheep other than those mortgaged and described in said mortgage and process, or made any request or gave any notice other than that contained in said process, and further answering alleges the facts with reference to the surroundings and giving of said bond are as set forth in paragraph three of this answer.

V.

Answering paragraph six of said complaint, this defendant says that it has not sufficient information or belief to enable it to answer the allegations of said paragraph six, to wit, that one Ralph Cowden had commenced an action against plaintiff as sheriff of Boise County, Idaho, and had recovered judgment in the District Court of the Third Judicial District in and for Canyon County, State of Idaho, for the sum of $19,195.87, and for costs amounting to $145.15, and wherein it was ordered and adjudged that

said Cowden have return of the property described in said affidavit and notice and so as aforesaid alleged, claimed by said Cowden, or in lieu thereof his damages in the sum of $19,195.87 and costs in the sum of $145.15, nor of any other judgment for return of property or damages, or costs in said matters, nor of the affirmance of such judgment, or any judgment in the premises on appeal in the Supreme Court of Idaho. Nor of the fact of plaintiff herein being liable to Ralph Cowden in the sums as in said paragraph six alleged, or of any other sum or sums of money by reason of said alleged judgment, nor of there being any judgment as alleged by plaintiff growing out of the matters alleged in said complaint, and for this reason denies the same.

Further answering said paragraph six this defendant denies that plaintiff herein appeared in any such alleged suit and contested the same at the instance or at the request or with the full knowledge, or any knowledge, or with notice to, or with the consent of, or by the advice of this answering defendant.

VI.

Answering paragraph seven of the complaint herein, this defendant denies that the conditions of said alleged indemnity bond have been broken, denies that this defendant is liable to the plaintiff because of the execution of said alleged bond and by virtue of the terms and conditions of the same in the sum of $19,195.87, principal and interest and the further sum of $145.15 costs, with interest on said amounts as on said paragraph seven alleged, or in any other sum or sums.

Second Defense.

For a further and second defense this defendant says that it adopts the allegations of paragraphs one, two, three, four, five and six, of its answer herein as fully as though herein fully set out and says that under said facts the bonds sued on in this action is without valid consideration, and was coerced and extorted from this defendant, was so taken and required without authority of law and contrary to both the statute and policy of law, and plaintiff is not required to recover thereon against this defendant.

Third Defense.

For a third and further defense this defendant says that the complaint herein does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

Wherefore, this answering defendant asks that this action be dismissed as against it and that it recover its costs herein expended.

MORRISON & PENCE and
NEAL & KINYON,
Attorneys for Flato Commission Co.

State of Idaho,
County of Ada,—ss.

B. F. Neal, being first duly sworn, deposes and says that he is one of the attorneys in the above entitled action for defendant, the Flato Commission, that he has read the foregoing answer, knows the contents thereof, and that the facts therein stated are true of his own knowledge except as to the matters stated therein to be on information and belief, and as to those matters he believes them to be

true. That affiant makes this affidavit for the reason that the Flato Commission Company is a corporation and absent from the county where the attorney resides and where the suit is filed.

B. F. NEAL.

Subscribed and sworn to before me this 15th day of April, 1905.

[Seal] L. V. HOUSEL,
Notary Public.

Due service of the within answer with copy admitted this 15th day of April, 1905.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Answer of Flato Commission Company. Filed April 15, 1905. A. L. Richardson, Clerk.

————

[Title and Caption Omitted.]

Notice to Produce Papers.

To the Above-named Defendants, and Their Attorneys of Record, Morrison & Pence and Neal & Kinyon:

You are hereby notified to have and produce at the trial of the above cause to be used as evidence in the above cause in case the plaintiff so desires them, all letters written from the Boise office of the American Bonding Company to the eastern office either at Denver, Colorado, or Baltimore, Maryland, notifying the said company that suit had been commenced against J. C. Mills, sheriff of Boise County, to recover for the value of the sheep sold under the chattel mortgage foreclosure of the Flato Commission

Company, and notifying said company of a certain notice served upon Charles F. Neal as the agent of said company of the commencement of said suit under date of August 29, 1902.

Also all other letters and communications, the dates of which are unknown to the plaintiff, touching said above matter of notice or relating to or concerning a suit of Ralph Cowden vs. J. R. Mills, or in any way relating to the commencement of said suit or the trial thereof or relating to the matter of the giving of the indemnity bond in the matter of the foreclosure proceedings of the Flato Commission Company above referred to.

If said papers are not produced, the plaintiff will introduce secondary evidence of the same.

W. E. BORAH,
Attorney for Plaintiff.

Service of copy admitted this 28th day of April, 1905.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Defendants.

[Endorsed]: No. 249. Notice to Produce Papers. Filed April 28, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Stipulation Waiving Jury.

It is hereby expressly stipulated and agreed in open court by and between counsel for plaintiff and defendants that a jury in the above-entitled cause is waived, and it is

agreed that said cause shall be tried by the court without a jury.

W. E. BORAH,
Attorney for Plaintiff.
MORRISON & PENCE,
NEAL & KINYON,
Attorneys for Defendants.

[Endorsed]: No. 249. Stipulation Waiving Jury. Filed May 1st, 1905. A. L. Richardson, Clerk.

At a Stated Term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on Monday, the 1st day of May, 1905. Present: Hon. JAS. H. BEATTY, Judge.

J. C. MILLS, Sheriff,
vs. No. 249.
AMERICAN BONDING CO., et al.

Order Setting Case for Trial.

Now came the parties by their respective counsel and thereupon a jury was waived in open court in accordance with stipulation on file and it was ordered that said cause be set for trial before this Court not prior to the 20th inst.

[Title and Caption Omitted.]

Notice to Take Deposition of George A. Hawkes.

To J. C. Mills Jr., and W. E. Borah, his Attorney:

The above-named plaintiff will take notice that on Sat-

urday the 27th day of May, 1905, the defendants and each of them will take the deposition of George A. Hawkes, a witness to be used as evidence on the trial of the above-entitled cause, at the law office of James D. Pardee, Attorney at Law, Eagle Block in the city of Salt Lake, County of Salt Lake and State of Utah, between the hours of 9 A. M. and 6 P. M. of said day, and the taking of said depositions will be adjourned from day to day (Sundays and legal holidays excepted) between the same hours until they are completed.

MORRISON & PENCE,
NEAL & KINYON,
Attorneys for all Defendants.

Received copy of the above notice this 29th day of April, 1905, and consent is given that said depositions may be taken at the time and place in said notice specified, subject to all objections as to competency, relevancy and materiality.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Notice to Take Depositions. Filed June 3, 1905. A. L. Richardson, Clerk.

[Title and Caption Omitted.]

Notice to Take Deposition of E d. H. Reid.

To J. C. Mills, Jr., Plaintiff, and W. E. Borah, his Attorney:

The above-named plaintiff, will take notice that on Monday, the 24th day of April, 1905, the said defendants and

each of them, will take the deposition of Ed. H. Reid, witness to be used as evidence on the trial of the above-entitled cause, at the Law Offices of Peete & Abrahams, No. 211 Continental Building, (corner 17th and Lawrence streets) in the city of Denver, County of Arapahoe and State of Colorado, between the hours of 9 A. M. and 6 P. M. of said day, and the taking of said depositions will be adjourned from day to day (not including Sundays and legal holidays) between the same hours until they are completed.

MORRISON & PENCE,
NEAL & KINYON,
Attorneys for Defendant.

Received copy of the above notice this 15th day of April, 1905, and consent is hereby given that said depositions may be taken at the time and place in said notice specified, subject to all objections as to competency, relevancy, and materiality.

W. E. BORAH,
Attorney for Plaintiff.

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(Deposition of Ed. H. Reid.)

State of Colorado,
City and County of Denver,
(formerly Arapahoe County),—ss.

The deposition of Ed. H. Reid, a witness produced and sworn before me, Lucy W. Piper, a notary public in and for the city and County of Denver, (formerly Arapahoe County) on the 24th day of April, A. D. 1905, pursuant

(Deposition of Ed. H. Reid.)

to the attached notice. This deposition taken on the part of defendant, the American Bonding Company of Baltimore and the Flato Commission Company, in a certain action now pending in the Circuit Court of the United States for the State of Idaho, Central Division, Ninth Circuit, wherein J. C. Mills is Plaintiff, and the American Bonding Company of Baltimore and the Flato Commission Company are Defendants.

The said Ed. H. Reid, being duly sworn, to testify the truth, the whole truth, and nothing but the truth relating to this cause, deposes as follows:

Q. State your name, age, and place of occupation?

A. Ed. H. Reid. Wyncote, Wyoming. Am vice-president and general manager of the North Platte Canal and Colonization Co., the Wyoming and Nebraska Land and Cattle Co., and the Rawhide Ranch Co.

Q. In what business were you engaged in July, 1902 And with what concern?

A. In the livestock commission business, with the Flato Commission Co. of South Omaha, Nebraska.

Q. What, if any, position, did you hold with this concern at that time?

A. I was one of the directors of this Company, and I was, I supose you might say, their General Western Agent.

Q. Are you the Ed. H. Reid who signed the so-called indemnity bond given in this case by the Flato Commission Company, and by the American Bonding Company of Baltimore as surety, and whose name, Ed. H. Reid as

(Deposition of Ed. H. Reid.)

director, agent and representative, is signed to the bond executed in this case?

A. Yes.

Q. What was the reason that the bond in question was given?

A. In the fall of 1901, some time about the 30th of November, one R. L. Shaw, then a resident of the State of Idaho, borrowed from the Flato Commission Company, $18,626.55 and to secure such loan, he gave the Flato Commission Company, its successors and assigns, a chattel mortgage upon certain cattle and sheep, then claimed to be owned and possessed by him, and situate in the State of Idaho, being marked, branded and described as follows, to wit, about thirty-five hundred head of yearling wethers and wool, about thirty-five hundred head of ewes, their increase and wool; about three thousand mixed lambs and wool; also, some two hundred native two year old steers, steers branded PP or TT on left hip; sheep branded and marked with quarter circle C, made thus C with black paint. The Flato Commission Company actually paid Shaw the amount of money mentioned in said mortgage, as a loan. The property mortgaged was valued by Shaw at over $36,000.00. In the early part of July, as I recollect it, the report came to Omaha, through Mr. Geo. A. Hawkes, our representative then in Idaho, that R. L. Shaw was supposed to have left the country. The Flato Commission Company then requested me to come to Idaho and to go over the territory with Mr. Hawkes

(Deposition of Ed. H. Reid.)

and look up these sheep and take actual possession of them. In following out these directions, I, together with Mr. Hawkes, came to Boise, Idaho, on or about July 21, 1902, and on the following day we employed Messrs. Hawley and Puckett to look after the interests of the Flato Commission Company, in the matter of getting possession of the sheep covered by the Shaw mortgage. On the same date, affidavit and notice required by the statutes of Idaho for the foreclosure of chattel mortgages by notice and sale, were drafted by Mr. J. H. Hawley, upon the representations and statements made to him by Mr. Hawkes and myself. Then, while we were there, Mr. Hawley called up Sheriff Finney and talked with him and he refused to make the levy in his county, unless the Flato Commission Company would furnish him with an indemnity bond, he stating to Mr. Hawley in our presence, but over the 'phone, that he would do nothing whatever looking to the taking of possession of the sheep in controversy under the process known as notice and sale, or otherwise, for the Flato Commission Company, until he had been indemnified; and growing out of the conversation between Mr. Hawley, Mr. Hawkes and myself on the one part, and Sheriff Finney on the other, the amount of the bond was at that time fixed as ten thousand dollars. On the following day, I returned to Salt Lake, from which place, I was recalled on July 26, 1902, for the purpose of executing an indemnity bond to the sheriff of Boise County Idaho, Mr. J. C. Mills, the plaintiff in this case. When

(Deposition of Ed. H. Reid.)

I returned I was informed by Mr. J. H. Hawley and also by our Mr. Hawkes, that they had located two bands of the Shaw sheep covered in our mortgage, in Boise County, and that Sheriff Mills, would not take any steps looking to a recovery of the sheep in foreclosure proceedings, until he had first been indemnified, with an indemnity bond for the value of the sheep, and twenty thousand dollars was suggested as the amount of the bond that should be given. Thereafter, for the purpose of procuring Sheriff Mills to make the levy in question, and to take possession of said sheep, under the process known as affidavit and notice, and sell the same upon notice and sale, as provided by the statutes of Idaho, and because of the fact that Sheriff Mills refused to do any act of thing whatever in and about the making of any such levy, until so indemnified, I, as representative of the Flato Commission Company, on the 26th day of July, 1902, executed the indemnity bond, a copy of which is attached to the complaint herein, for and on behalf of the Flato Commission Co., and at my request and on my application, said bond was executed by said American Bonding Company of Baltimore, as surety. On the same day, the affidavit and notice required in foreclosure of chattel mortgages to be executed and signed by the mortgagee, or his agent or representative, were duly executed and signed and they, together with the bond of indemnity herein referred to, were mailed to Sheriff Mills. And thereafter, the sheriff proceeded to levy upon the sheep described in the affidavit and notice, being the sheep

(Deposition of Ed. H. Reid.)

mortgaged by said R. L. Shaw to the Flato Commission Company. The sheep mortgaged by R. L. Shaw to the Flato Commission Company are the only sheep which the bond of indemnity contemplated being taken in the foreclosure proceedings, and if any other sheep were taken, they were not taken by the authority or under the direction of myself, or any other representative of the Flato Commission Company.

Q. Have you stated all of the surroundings of, and reasons for, the giving of the bond in question?

A. Yes, I think they are fully covered by my preceding answers.

Q. How far do you reside from Boise, and do you expect to be in the locality of Boise, in the near future?

A. My home is at Wyncotte, Wyoming, about one thousand miles from Boise. I expect to remain there permanently.

ED. H. REID.

State of Colorado,
City and County of Denver,
(formerly Arapahoe County),—ss.

I, Lucy W. Piper, a notary public in and for said county hereby certify that the above named Ed. H. Reid was by me first duly sworn according to law, to testify the truth, the whole truth, and nothing but the truth relating to said cause; that his deposition was reduced to writing by me, and said deposition was taken at the time and place in said notice specified, in the city and county of Denver,

being in place identical with the former county of Arapahoe, in the State of Colorado, and was taken on the 24th day of April, A. D. 1905, between the hours of 9 A. M. and 6 P. M. of said day.

In testimony whereof I have hereunto set my hand and Notarial seal this 24th day of April, A. D. 1905.

My commission expires March 2d, 1907.

[Seal] LUCY W. PIPER.
Notary Public.

[Endorsed]: No. 249. Deposition of Ed. H. Reid. Filed April 27th, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Notice to Take Deposition of James C. Dahlman.

To J. C. Mills, Plaintiff, and W. E. Borah, his Attorney:

The above-named plaintiff, will take notice that on Saturday, April 29th, 1905, the said defendants, and each of them, will take the deposition of James C. Dahlman, witness to be used as evidence on the trial of the above-entitled cause, at the Law Offices of J. H. Van Duesen, New York Life Bldg., Omaha, Douglas County, Nebraska, between the hours of 9 A. M. and 6 P. M. of said day, and the taking of said depositions will be adjourned from day to day (not including Sundays and legal holidays) between the same hours until they are completed.

MORRISON & PENCE, and
NEAL & KINYON,
Attorneys for Defendants.

Received copy of the above notice this 20th day of April, 1905, and consent is hereby given that said depositions may be taken at the time and place in said notice specified, subject to all objections for competency, relevancy and materiality.

W. E. BORAH,
Attorney for Plaintiff.

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Deposition of James C. Dahlman.

Deposition of James C. Dahlman, the witness, taken before me, Nettie Floren, a notary public, to be used in an action wherein J. C. Mills, Jr., late sheriff of Boise County, Idaho, in plaintiff, and the American Bonding Company of Baltimore and the Flato Commission Company are defendants, pending in the Circuit Court of the United States for the District of Idaho, Central Division, in persuance of the annexed notice, and at the time and place therein stated. No appearance on behalf of plaintiff. B. F. Neal of Neal & Kenyon of Boise, Idaho, appearing on behalf of each of defendants. Thereupon defendants produced the following witness, to wit:

JAMES C. DAHLMAN, being by me first duly examined, cautioned and solemnly sworn, as hereinafter specified, depose and saith as follows:

(Examination by Mr. NEAL.)

Q. You may state your name, place of residence and occupation.

(Deposition of James C. Dahlman.)

A. James C. Dahlman; South Omaha, Nebraska; livestock commission business.

Q. For how long have you been engaged in the livestock commission business at South Omaha?

A. About seven years.

Q. For how long have you been engaged in the livestock business?

A. For thirty years.

Q. For how many years have you been familiar with the handling of sheep and other livestock?

A. All my life.

Q. In what States or localities have you been engaged in the sheep business other than as a livestock man of South Omaha?

A. In Texas, Wyoming and Montana.

Q. What was the nature of your business as a livestock man while in these various States?

A. I bought, sold, raised and shipped.

Q. Are you the James C. Dahlman who was secretary and manager of the Flato Commission Company in the year 1902 at the time of the beginning and trial of the actions which were tried in Canyon County, Idaho, entitled Ralph Cowden vs. William Finney, Sheriff of Blaine County, Idaho, and Ralph Cowden vs. J. C. Mills, Jr., Sheriff of Boise County, Idaho, in which action Cowden sought damages as for conversion for the taking of certain sheep which said sheriffs had levied on as the property of the Flato Commission Company?

(Deposition of James C. Dahlman.)

A. Yes, sir.

Q. You were present at this trial also?

A. Yes, sir.

Q. Are you acquainted with the market value, and do you know how the market value is determined in the United States of livestock, as, for instance, sheep?

A. Yes, sir.

Q. Will you explain?

A. Well, in the first place, they are all gauged by the price that they bring on the different livestock markets at Chicago, South Omaha, Kansas City, and St. Joseph.

Q. During the years in which you state you were engaged in the business of buying, selling and shipping sheep, prior to the time that you began business at South Omaha in the livestock commission business, what method or basis did you use in determining the prices at which you bought and sold sheep and other livestock?

A. Always from what they will sell at on the market at South Omaha, Chicago, Kansas City and St. Joseph. In buying the sheep on the range, you would figure on what they bring on the market and the price of wool.

Q. In your experience as buyer and seller of sheep prior to the time that you began business on the stock exchange of South Omaha, how did you determine the prices which you paid for sheep, or the prices at which you sold sheep, as the case might be?

A. In buying sheep on the range, we always manage to keep posted as to what they were selling at on the dif-

(Deposition of James C. Dahlman.)

ferent livestock markets. We tried to get daily reports, if possible. And the prices that are quoted that they are bringing on the markets, that fixes the price on the range.

Q. Do you know of any other method which is in use in determining the value of sheep and other livestock, except by reference to the prices at which they are bought and sold in the various principal markets mentioned by you?

A. That is the only way prices can be fixed. They all have to come to the market when they are ready for market and it is what they bring on the markets that a man must figure on paying out in the country.

Q. Is there a market value for wethers during the period of July and August?

A. Yes, sir.

Q. If wethers are bought during the period, say during the months of July and August of any year, what would be the ordinary and usual prices which would be paid for them, and in fact, be their market value? I mean with reference to what they would sell for packers' purposes on the several markets mentioned?

A. A man would simply consider the price they bring on the market. He would not be buying them at that time of the year for what wool he could get off of them as they usually shear in May and June and he would have to figure altogether on what a wether would bring on the livestock market.

(Deposition of James C. Dahlman.)

Q. What would be the value of wethers, one and two years old, in the State of Idaho, having reference to the price at which they would sell upon the markets at Omaha, St. Joseph or Kansas City? I mean would it be the same price, more or less?

A. A wether weighing 100 pounds bought in Idaho and shipped to South Omaha or Chicago would cost somewhere from 75 cents to $1.00 for shipping, counting the shrinkage, freight and expense of handling them, so that a wether worth $3.00 on the market would be worth about $2.50 in Idaho. If bought by the hundred, if a man could get $3.50 a hundred for them on the market, he could not afford to pay more than $2.50 a hundred for them in Idaho as it would take about $1.50 a hundred for shipping and handling.

Q. At what age are wethers usually marketed?

A. Well, they are shipped from one year old, up. The yearling wether is usually bought for feeding purposes. The older wethers would go for mutton but the price of the feeding wether depends largely on the corn crop. If there is a good corn crop, there is a big demand for yearling wethers, but very few are for sale for mutton. The older wethers usually go for mutton. But the price, where there is a demand for feeder wethers, is usually about as high as the price paid for mutton. A yearling wether is worth more than an older wether for feeding. Substantially all wethers are marketed at one and two

(Deposition of James C. Dahlman.)

years old, occasionally a bunch is held over till they are three and four, but not very often.

Q. When yearlings are bought for feeding purposes as described by you, what is taken as a standard by which to measure their values?

A. The price that mutton is selling at and the price that feeders are selling at in the principal markets.

Q. In your experience as described by you as a buyer, shipper and seller of sheep, have you had any experience with and are you familiar with the handling and the market value of lambs?

A. Yes, sir.

Q. How is the market value of lambs determined and when are they usually sold?

A. The value is determined by the price they are bringing on the livestock market. Seventy-five per cent of all the lambs raised are sold in the fall of the year, either for feeders or killers.

Q. About when does the lamb market begin?

A. Begins about the first of August.

Q. Extending about how late in the fall?

A. Extending till about the first of December.

Q. In determining the price of lambs on the range in Idaho, whether for feeders or killers, what would you take in consideration?

A. What they are bringing on the livestock market and what it would cost to ship and handle them.

Q. About how much per hundred pounds, would it cost

(Deposition of James C. Dahlman.)

to ship and handle lambs, say in Central Idaho, or in Blaine County or Boise County, Idaho?

A. Cost about 75 cents a hundred pound.

Q. And about how much per individual lamb?

A. Cost about 50 cents a head to ship and handle a lamb from Idaho on either of the livestock markets.

Q. Do you know in your experience as a feeder, buyer, and seller of sheep, and in your experience as a livestock commission man, both or either, of any value for lambs, except as it is fixed and determined relatively by the prices at which they are bought and sold in the principal markets which you have mentioned?

A. No, sir.

Q. Is there any newspaper, or any book, or any record of any kind which is regarded by those engaged in the business and the public generally as an authority of record of the daily sales of sheep of the various markets of the United States?

A. Yes, sir. Each market has from one to three daily papers that give the reports of the bulk of the sales that are made each day of sheep, cattle or hogs.

Q. And give an accurate report of the prices at which sheep of the different grades are sold each day?

A. Yes, sir.

Q. Is the "Daily Drovers' Journal Stockman" of South Omaha, Nebraska, a paper which is generally taken and distributed and read among livestock men and among

(Deposition of James C. Dahlman.)

farmers and stock-raisers who are interested in the sheep and other livestock business?

A. Yes, sir.

Q. Is the paper of general circulation?

A. Yes, it is a paper of large circulation taken by most of the stockmen in the west.

Q. Does it contain accurate statements of the daily sales of sheep and other livestock at the markets of South Omaha, and other places where livestock is sold?

A. Yes, sir.

Q. It gives a full report of the South Omaha sales and then gives the number of cattle, hogs and sheep received at each of the other markets and whether it is higher or lower than the preceding day, and generally a synopsis of the highest, medium and lowest prices for the day on each class of stock. Besides that, each stock exchange gets the market reports from the different markets each morning before any sales are made. For instance, the Chicago exchange would wire the South Omaha Exchange the prices on hogs, cattle and sheep which are marked up on a blackboard of the exchange for the benefit of each commission house and also the stockmen that are on the market on that day. Like reports are also sent from Kansas City, and in a similar manner South Omaha markets are wired by the stock exchange to Chicago, Kansas City and the other principal livestock markets and these posted.

Q. Is the "Daily Drovers' Journal Stockman" published at South Omaha, Nebraska, considered a reliable

(Deposition of James C. Dahlman.)

and accurate reporter of the livestock markets, especially the livestock market of South Omaha, Nebraska?

A. Absolutely.

Q. It is generally received and held to be a correct report of exchange markets?

A. Yes, sir. It is patronized heavily by the commission men, and they would have to give correct reports in order to get the patronage, and by stock-raisers and drovers throughout the West.

Q. Were you the representative of the Flato Commission Company who took the R. L. Shaw mortgage?

A. I did not prepare the mortgage. I was there when it was made and knew of the details of the transaction at the time. The company paid and advanced to Mr. Shaw the amount of money mentioned in the mortgage, being something over $18,000. I have not now the exact figures with me.

Q. Do you keep posted on the market value of sheep at the various markets of the United States?

A. Yes, sir.

Q. Are you acquainted with the value of lambs in the fall of 1902, say for the period—July 23d to October 1st, inclusive?

A. Yes, sir.

Q. State what the market value of good average lambs was at that time?

A. They sold from $3.75 to $4.50 per hundred.

Q. And what is the weight of an average lamb?

(Deposition of James C. Dahlman.)

A. They weigh from 55 to 60 pounds.

Q. Are you acquainted with the price of ewes during the same period?

A. Yes, sir.

Q. What was the price of ewes during the same period?

A. They were worth from $2.75 to $3.00 per hundred if they were killers, that is, if they were dry ewes and fit for killers. If they had been suckling a lamb and were thin and would have to sell for feeders, they would sell from $2.50 to $3.25 per hundred.

Q. And about what price is the average weight of what you term killers, that is, ewes of the marketable age mentioned?

A. They would weigh from 80 to 100 pounds and an ewe that had been suckling a lamb would weigh from 65 to 80 pounds.

Q. What was the market value during the time mentinoed of ewes older than three year olds?

A. They were sold all the way from $1.25 to $2.25 per hundred. It would depend on the condition that they were in, and, whether they had good mouths. A good mouthed ewe from four to seven years old sold at from $2.00 to $2.25. One that was thinner and did not have a good mouth sold for $1.25 to $1.75 per hundred.

Q. And what is the usual weight of ewes of these ages?

A. They would weigh from about 70 to 75 pounds.

Q. The values which you have given for lambs and ewes, are they founded upon the prevailing prices at the

(Deposition of James C. Dahlman.)

markets, or are these values the values they ought to sell for and did sell for on the range?

A. The price I am quoting are what they would bring on the market. To compare the range price with that, it would be necessary to take off from 75 cents to $1.00 a hundred for freight and expenses that it would cost to ship these sheep to the market.

Q. How much per hundred would you take off of lambs?

A. I would take off from 50 to 75 cents per hundred.

Q. And off of ewes?

A. About $1.00 a hundred.

Q. Do you expect to be in the vicinity of Boise, Idaho, some time in the near future?

A. No, sir.

Q. How far is it from here to Boise, Idaho?

A. About fifteen or sixteen hundred miles.

JAMES C. DAHLMAN.

State of Nebraska,
County of Douglas,—ss.

I, Nettie Floren, a notary public within and for the County of Douglas, State of Nebraska, do hereby certify that James C. Dahlman was by me duly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by myself in the presence of the witness and was subscribed by the said witness in my presence and was taken at the time and place in the an-

nexed notice specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto affixed my official seal at Omaha, Nebraska, this 29th day of April, A. D. 1905.

[Seal] NETTIE FLOREN,
Notary Public.

[Endorsed]: No. 249. Deposition of James C. Dahlman. Filed May 3d, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, for the District of Idaho, Central Division.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,
Plaintiff,
vs.
AMERICAN BONDING COMPANY OF BALTIMORE AND FLATO COMMISSION COMPANY,
Defendants.

Depositions of O. W. Eaton a nd John R. Bonson.

United States of America,
State of Nebraska,
County of Hall,—ss.

Be it remembered that on this 26th day of April, A. D. (in the year of our Lord), one thousand nine hundred and five (1905) I, O. A. Abbott, a notary public, duly com-

missioned and qualified for and residing in the county and State aforesaid, at the office of Abbott & Abbott in the city of Grand Island, in the county of Hall and State of Nebraska aforesaid, between the hours of nine (9) o'clock A. M. and six (6) o'clock P. M. of said day, in pursuance of the notice and agreement hereunto attached did call and cause to be and personally appeared before me at said office at the time and place in said notice specified the following named persons, to wit:

O. W. EATON and JOHN R. BONSON, sundry witnesses in behalf of the above named defendants to testify and the truth to say on the part and behalf of the defendants above named in a certain suit and matter in controversy now pending in the Circuit Court of the United States, Ninth Circuit, for the District of Idaho, Central Division, wherein J. C. Mills, Jr., late sheriff of Boise County, Idaho, is plaintiff, and the American Bonding Company of Baltimore and the Flato Commission Company are defendants, and the said O. W. Eaton being about the age of 60 years and having been by me first duly cautioned and solemnly sworn to testify to the truth, the whole truth and nothing, but the truth in the matter of controversy aforesaid, I did carefully examine the said O. W. Eaton and he did thereupon depose, testify and say as follows, to wit:

Neal & Kinyon appearing on behalf of defendants; no counsel appearing on behalf of plaintiff.

(Deposition of O. W. Eaton.)

(Examination by Mr. B. F. NEAL.)

O. W. EATON.

Q. State your name and place of residence?

A. O. W. Eaton, Wood River, Nebraska.

Q. How long have you resided at your present home?

A. About 15 years.

Q. Were you in the State of Idaho and in the vicinity of Caldwell in the State of Idaho during the year 1902?

A. Yes, sir; I think we arrived there, myself and Mr. J. R. Bonson, about the 8th of June. I remained there in that locality and I think I left there somewhere between the 12th and 15th not later than that, after being up in the neighborhood of Caldwell and Weiser.

Q. Are you acquainted with one W. L. Shaw?

A. Yes, sir.

Q. How long have you been acquainted with him?

A. He fed at my place either four or five years before 1902, and was there five or six months.

Q. Are you acquainted with one J. B. Gowan?

A. I never met Mr. Gowan until that time that we were at Caldwell in the summer of 1902.

Q. Are you acquainted with one Ralph Cowden?

A. Yes, sir, I met him in the summer of 1902, at Caldwell, Idaho.

And it being about the hour of 12 o'clock noon and the notary being necessarily engaged in other business during the rest of the day, the further taking of these depositions is continued until tomorrow, Thursday, April 27th, A. D.

(Deposition of O. W. Eaton.)

1905, at the hour of nine (9) o'clock A. M. at the same place.

Office of Abbott & Abbott, City of Grand Island, County of Hall and State of Nebraska.

B. F. Neal, attorney for defendants, and the witnesses, O. W. Eaton and John R. Bonson, being present, the taking of the depositions is proceeded with pursuant to the adjournment as aforesaid.

On request of counsel for defendants the witness O. W. Eaton is withdrawn and the examination of the witness John R. Bonson commenced, the further examination of the witness O. W. Eaton being shown herein hereafter.

I, O. A. Abbott, the notary public within and for the aforesaid county and State and at the aforesaid time and place in the aforesaid controversy do certify that the said John R. Bonson, being of about the age of 31 years, and having been by me first duly cautioned and solemnly sworn to testify to the truth, the whole truth and nothing but the truth in the matter in controversy examined the said John R. Bonson and that he did thereupon depose, testify and say as follows, to wit:

(Examination of Mr. B. F. NEAL.)

JOHN R. BONSON.

Q. State your name, occupation and place of residence?

A. John R. Bonson. I live at Scotia, Nebraska, and am engaged in rachine, farming and cattle feeding.

Q. How long have you lived at Scotia, Nebraska?

A. About one year.

(Deposition of John R. Bonson.)

Q. Where did you reside prior to that time?

A. In Grand Island, Nebraska.

Q. In what business have you been engaged in in the last 10 or 12 years?

A. Buying and selling stock, feeding and farming some.

Q. What class of stock have you been engaged in buying and selling?

A. Cattle, sheep and hogs.

Q. Were you familiar with the sheep business, with the handling of sheep, buying and selling of sheep, quality and grades and prices in the year 1902, and prior thereto?

A. Yes, sir, I aimed to keep posted on the market as close as possible.

Q. Are you acquainted with one J. B. Gowan?

A. Yes, sir.

Q. Where did you become acquainted with him?

A. At Grand Island about 10 or 12 years ago.

Q. Where did he live in the year 1902, if you know?

A. Caldwell, Idaho.

Q. Are you acquainted with one R. L. Shaw?

A. Yes, sir.

Q. Where did you get acquainted with him?

A. At Grand Island, about seven years ago.

Q. Where did he live in the year 1902?

A. I understood his family lived somewhere in Portland, Oregon, but he spent a great deal of his time in Idaho where he had sheep interests.

(Deposition of John R. Bonson.)

Q. Was he at that time or had he been interested in business with your father, Nick Bonson?

A. They had a good many transactions but as to their being in partnership I don't think they had been.

Q. Did you have any correspondence with Gowan during the year 1902 or did you see any correspondence from him with reference to his having any sheep for sale?

A. I seen a letter that he had written to Nick Bonson offering quite a large bunch of sheep for sale or that they would offer them a little later in the season, this being sometime during the month of May, 1902.

Q. Do you know where that letter is?

A. I destroyed it, it was burned up or destroyed.

Q. What sort of sheep did he say in the letter that he had for sale?

A. He represented several bands of wethers known as the Shaw and Gowan wethers and several bands of ewes and lambs that he spoke of as the Cowden and Gowan sheep.

Q. Did he price them to you at that time?

A. No, sir.

Q. What did you do if anything with reference to this letter in the matter of these sheep being for sale?

A. Well, I wrote to O. W. Eaton of Wood River, Nebraska, asking him if he would care to take a trip out there to Idaho with a view to looking at these sheep or what other bands we might find for sale.

Q. What further was done then than the writing?

(Deposition of John R. Bonson.)

A. About the 5th of June we went out there and stopped at Caldwell, Idaho.

Q. Yourself and O. W. Eaton?

A. Yes, sir.

Q. Where did you board and room while in Caldwell, Idaho?

A. When we first got there we stopped for a day or two at the depot hotel.

Q. And after that time?

A. After that we took our meals at different places and slept at Gowan's house.

Q. During the time that you were stopping at Gowan's house which as I understond you was a day or two after you got there did you have any conversation with Gowan with reference to the Shaw sheep?

A. Yes, sir, we did.

Q. Just tell what he said?

A. He claimed that he had charge of both the Shaw wethers and the Shaw and Gowan wethers and also had charge of the Cowden and Gowan ewes and lambs, that the wethers was running over near Hailey, Idaho, and that the ewes and lambs were out near Council.

Q. Did you talk to him at this time about buying these sheep or any portion of them?

A. I told him that I might buy the wethers if the price was right.

Q. What did he say about it?

(Deposition of John R. Bonson.)

A. He said he wouldn't price the wethers until Shaw returned from Portland, Oregon.

Q. Did he tell you when he was expecting Shaw back?

A. In a few days, he said.

Q. Did he tell you anything about the character and condition of these sheep, I mean the Shaw and the Shaw and Gowan wethers?

A. He said they were yearlings and two year old wethers and that they ought to be in fair flesh.

Q. Tell you anything about what they were worth?

A. No, sir, not at that time.

Q. He did afterwards?

A. He afterwards asked me, about two weeks later he asked me, if they were worth $2.50 per head and I told him no, that I wouldn't think of giving that price for them on the present market.

Q. Was that conversation with reference to the price at a time when you had personally examined the sheep?

A. Yes, sir, that was on the ground while we were looking at the sheep over near Hailey, Idaho.

Q. During the week or more that you were stopping sleeping at his home with Mr. Eaton and stopping with him immediately after your arrival at Caldwell, Idaho, did you have any other conversation with him about the bands of wethers in Boise County, near Hailey?

A. We had a good many conversations but they were all of about the same nature, that he had charge of the

(Deposition of John R. Bonson.)

sheep but that he wouldn't offer them for sale or price them until Shaw returned from Portland, Oregon.

Q. Did he give you any reason why he wouldn't offer them for sale or name any price?

A. Well, from his conversation Shaw was the main owner but that Gowan had charge of the sheep.

Q. What was the nature of the interest which Gowan claimed to have in these sheep as evidenced by his conversations with you at the time I mean in the Shaw or Shaw and Gowan wethers?

A. From his conversation I took it that he got a thousand dollars a year for managing the business, running these sheep.

Q. Then I am correct in the statement that Gowan gave you to understand that his sole interest in the Shaw or the Shaw and Gowan wethers was that Shaw owed him for his services in taking care of the sheep?

A. Yes, sir, he owed him for his services in taking care of the sheep and also that there was an unsettled account between them for an undivided feeding account that hadn't been settled at that date between Shaw and Gowan.

Q. Growing out of a partnership deal in feeding other sheep?

A. Other sheep at previous times in Nebraska and also in buying and selling several bands of sheep in Wyoming and Idaho in the winter of 1901 and 1902.

Q. That is the winter preceding the one that you were there?

(Deposition of John R. Bonson.)

A. Yes, sir.

Q. Did you have any conversation with J. B. Gowan shortly after your arrival there in which he described to you the financial condition of Shaw?

A. Not the first few days he didn't say anything about the financial condition of R. L. Shaw during the first few days but later he did speak of Shaw as having mortgaged all his sheep to the George, Adams Frederick Company of Omaha and the Flato Commission Company, and that Shaw was gone and that he thought he had skipped the country for good.

Q. About what date did you have this conversation with Gowan in which he told you about Shaw having mortgaged his sheep to these different people that you have mentioned?

A. About the 17th or 18th of June, 1902.

Q. Did he at that time or at any other time tell you when it came to his knowledge that these sheep were mortgaged to the Flato Commission Company and the George, Adams Frederick Company or to either of them?

A. Yes, sir, he said he had just looked up the records and found out.

Q. Did you have any further conversation with him at this time with reference to his affairs and Shaw's?

A. Yes, he said that he had been hoping that Shaw would return and settle up with him and pay him what Shaw was owing him, he claimed that there was quite an amount of money due him on an old feeding account and

(Deposition of John R. Bonson.)

the profits of some previous deals in Idaho, Wyoming and Nebraska, from feeding sheep and that he also had advanced some of his own money for paying the expenses of running the shaw and Gowan sheep.

Q. When you speak of the Shaw and Gowan sheep you mean the sheep which Gowan gave you to understand that he received a thousand dollars a year for running?

A. Yes, sir.

Q. That is the two or three bands of Shaw wethers which were near Hailey?

A. Yes, sir.

Q. Did he tell you what his relations to Shaw were in the former deals in Nebraska, Wyoming and Idaho?

A. It was a partnership deal, Gowan was interested in the profits or losses of the deals.

Q. About how long was it after you first went out there and first met Gowan in June, 1902, that you had this conversation with him in which he told you that these sheep were all mortgaged?

A. About ten days.

Q. Up to that time, that is up to the day when he told you these sheep were mortgaged to the parties whom you have mentioned who had Gowan always spoken of as the owner of these sheep and what had he always mentioned his relation to them as being?

A. Well, he represented them as the Shaw wethers or sometimes he would speak of them as the Shaw and

(Deposition of John R. Bonson.)

Gowan deal or the Shaw and Gowan sheep and that he had charge of them or that he was running the sheep.

Q. Did you meet and were you acquainted with Ralph Cowden of Caldwell, Idaho, prior to the 17th day of June, 1904?

A. I think I first met Cowden about the 13th or 14th of June at Caldwell, Idaho, at his office.

Q. What business was he engaged in at that time?

A. He was engaged in the lumber business.

Q. Have any conversation with him about buying sheep at that time?

A. I told him we were out looking over the country to see what could be bought.

Q. Did he have any sheep for sale at that time?

A. He had some but he didn't offer them for sale.

Q. Did he describe them to you?

A. Yes, sir, he described several bands of ewes and lambs that he had up near Council and that he and Gowan were in the deal.

Q. Did he describe any other sheep than ewes and lambs that were owned by him or by him and Gowan?

A. No, sir.

Q. On the same date did you have any conversation with him with reference to R. L. Shaw?

A. Yes, sir, he spoke of Shaw being away and that he hoped he would come back and fix up some business matters with Gowan because he wanted Gowan to put some money into their sheep deal.

(Deposition of John R. Bonson.)

Q. Did he say anything further about Shaw at that time?

A. Not at that date.

Q. Did he at that time say anything to you about having made a purchase of the Shaw or Shaw and Gowan sheep?

A. No, sir.

Q. Did he say anything to you at that time about owning the Shaw or Shaw and Gowan sheep?

A. No, sir.

Q. Was there anything said in the conversation about the wethers known as the Shaw or Shaw and Gowan wethers?

A. Yes, sir, he spoke of Gowan as having charge of them and running the sheep but nothing further than that.

Q. When did you next after the date which you have mentioned which I believe you have described as the 13th of June, did you have any conversation with Cowden with reference to the Shaw wethers?

A. About the 21st of June Cowden told me that he had a bill of sale of these wethers given him by Gowan and that the sheep belonged to him now, he also told me a day or two preceding the 21st of June, 1902, that Shaw had mortgaged his stuff and left his stuff in bad shape financially and that he thought he had skipped the country for good.

Q. Did Cowden at the time mentioned in the later part of your answer when he told you about his belief that

(Deposition of John R. Bonson.)

Shaw's property was mortgaged go into details as to why he thought this to be so and if so state what they were?

A. I don't think he did.

Q. Did he state to you at that time when it first came to his knowledge that Shaw had mortgaged his stuff?

A. He didn't tell me when it came to his knowledge but it was a day or two previous to about June 21st that he knew it.

Q. Did he at any time tell you when he first found out that Shaw's stuff as you speak of was mortgaged?

A. No, sir, any more than when I first met him he never mentioned the matter of Shaw's stuff all being mortgaged, it wasn't mentioned during our first conversations at all.

Q. At the time when he told you, one or more days prior to June 21st, 1902, that the Shaw sheep were mortgaged or the Shaw stuff as mentioned by you, had he ever told you that he claimed to have any interest whatever of any kind in the so-called Shaw or Shaw and Gowan wethers?

A. He never represented to me as having any interest in them at all prior to the time that he told me that he had a bill of sale of them.

Q. Are you positive that the date when he first informed you that he had a bill of sale of the Shaw sheep or the Shaw and Gowan wethers was of a later date than the date on which he told you that all of Shaw's stuff was mortgaged?

A. Yes, sir, it was at a later date, several days later.

(Deposition of John R. Bonson.)

Q. Had you and Cowden ever had a talk with reference to what stuff Shaw had in Idaho, or putting it in another way, what property and what sort of property do you mean when you say Shaw's stuff?

A. I meant the several bands of yearlings and two year old wethers near Hailey, Idaho.

Q. Was that the reference made by Cowden at the different times when he spoke to you of Shaw's stuff being mortgaged?

A. Yes, sir.

Q. Did he ever speak to you of Shaw having any other property that the different bands of one and two year old wethers?

A. No, sir, he never spoke of Shaw having any other interests in that country outside of the wethers.

Q. Do you know how many head there were and where they were supposed to be located?

A. They were about 30 miles southwest of Hailey, I take it to be southwest the way we drove going there.

Q. How did he speak of their location?

A. He spoke of them as being in the Hailey Country.

Q. Prior to the 21st of June, 1902, when Cowden first told you that he had a bill of sale for the Shaw wethers had you ever had any conversation with him with reference to the purchase of these wethers?

A. Yes, sir, I told Cowden that on Shaw's return I might go out and take a look at them, the wethers, I mean, with a view of buying them.

(Deposition of John R. Bonson.)

Q. How did you come to tell Cowden these facts?

A. Cowden asked me if I was going out to look at them

Q. When was it that Cowden told you that the Shaw sheep were mortgaged with reference to the time that Gowan had told you that Shaw had mortgaged them?

A. It was at a later time when Cowden told me that when Gowan told me, or it was the same time but a day or so later.

Q. Did Gowan ever tell you in round numbers the amounts of the mortgages which George, Adams Frederick Company and the Flato Commission Company held against these sheep?

A. Yes, sir, he told me that George, Adams Frederick Company held about $16,000.00 and the Flato Commission Company about $18,000.00.

Q. Did he ever tell you anything about why these mortgages were given and what was done with the money?

A. No, sir.

Q. Did Cowden ever tell you when the bill of sale in question and to which you have referred was executed to him by J. B. Gowan?

A. It was about the 21st or 22d day of June, 1902, that he made the remark to me that Gowan had just given him a bill of sale for them.

Q. You are sure that those are the words, "had just given him a bill of sale," are you?

A. Yes, sir.

(Deposition of John R. Bonson.)

Q. Had he ever prior to that date ever claimed to have any interest in the Shaw or Shaw and Gowan wethers?

A. No, sir.

Q. Had J. B. Gowan ever prior to that date claimed to have any interest as owner in the so-called Shaw or Shaw and Gowan wethers?

A. No, sir, he never spoke of the sheep as him being one of the owners, but he did make the remark previous to that time that if he sold us the sheep he would sell them as the Shaw wethers and he did claim also that Shaw was owing him for money advanced in taking care of these sheep and an unsettled profit on some former deals or an undivided profit on some former deals.

Q. Had he ever at any time offered to sell these sheep to you as his sheep?

A. No, sir.

Q. Had he ever offered to sell them to you as the sheep of Shaw and Gowan?

A. No, sir, he wouldn't price me the sheep at all nor offer me the sheep for sale until after Shaw's return from Portland, Oregon, but Shaw never returned but after June 22d, or about the 23d I went to Hailey, Idaho, and there met Gowan and we went out to look at the sheep and he offered the sheep for sale as the Cowden wethers.

Q. Did he tell you that they were the same sheep that he had before described as the Shaw wethers?

A. No, sir, he didn't but he described the brands on

(Deposition of John R. Bonson.)

the wethers previously as being the Shaw brands and when we got there those were the brands the sheep had.

Q. Describe the brands?

A. I noticed some with a quarter circle G brand and some with an S brand and a quarter circle G brand.

Q. All made with black paint?

A. Black or red, the brands had growed dusty and you couldn't tell whether it was red or black paint.

Q. Had Gowan described to you the brands which were on the Shaw wethers prior to the time when you went up there?

A. Yes, sir.

Q. And were the brands of which you have just given a description the ones which he told you were on the Shaw wethers?

A. Yes, sir.

Q. What were the brands which you found upon the Cowden wethers which Gowan offered for sale to you about the 23d of June, 1902, in the vicinity of Hailey, Idaho?

A. They were branded a quarter circle G with black or red paint and some branded S and a quarter circle G with black or red paint. I say black or red paint on account of the brands being full of dust and you couldn't tell originally whether it had been black paint or red paint.

Q. Did the brands correspond on the location on the sheep described by Gowan as the Shaw sheep prior to the time when you went there into the Hailey country with

(Deposition of John R. Bonson.)

the location and brands on the sheep which he showed to you when you went there?

A. They were represented as being branded on the back with that brand and that's the way I found them branded.

Q. Did you ever have any conversation with J. B. Gowan while with him in the vicinity of Hailey on or about the 23rd of June, 1902, as to whether the sheep which he showed you were the same sheep, the same identical sheep which he had before talked to you about as belonging to R. L. Shaw and being for sale?

A. Yes, he said he had sold the sheep to Cowden and that he would sell me the sheep as Cowden's sheep.

Q. At the time that you were up there to see them did he make you any offer on these sheep, any price that he would sell them at?

A. He asked me if I would give $2.50 a head for them.

Q. What did you say to that?

A. I told him they wasn't worth $2.50, and that if I was buying them I would give $2.00.

Q. What further conversation was there had at this time as to the value of these sheep?

A. Well, I don't remember.

Q. How many bands of Shaw sheep or as they were then called Cowden sheep were shown you by Gowan when you were in the vicinity of Hailey on or about the 23d of June, and about how many head if you know?

A. There was two bands of about twenty-eight or twenty-nine hundred each, that was the amount the herder

(Deposition of John R. Bonson.)

claimed there was in the two bands that is 2,800 or 2,900 in each band or 5,600 or 5,700 in the two bands.

Q. Do you remember who was herding these sheep?

A. No, sir, I don't, the foreman's name was Parks, I believe.

Q. You looked these sheep over carefully at the time that you were there?

A. Yes, sir, I did.

Q. What condition were they in, what grade of sheep?

A. They were what we would call a heavy pelted sheep, not the best of sellers but in fair flesh.

Q. Do you know what the value of such sheep was in the summer of 1902?

A. I could only tell by referring to the market reports of that date owing to lapse of time.

Q. Referring back to your conversation with Cowan with reference to Shaw and these sheep did Cowden at any time prior to June 21st tell you anything further than what you have already stated as to Shaw having mortgaged his sheep?

A. He said that Shaw had mortgaged a lot of stuff to different eastern people and had skipped the country.

Q. Did Gowan or Cowden at any time tell you when the bill of sale testified to by you was executed?

A. No, sir, they didn't give me the date, it was about the 20th of June, 1902.

Q. How do you fix the 20th of June as the date to which they referred?

(Deposition of John R. Bonson.)

A. That was about the date that Cowden told me that he had just gotten a bill of sale of these sheep.

Q. Those were the words that he used, "just gotten a bill of sale of those sheep," were they?

A. Yes, sir.

Q. And he made that statement to you that he had just gotten a bill of sale of those sheep on that day?

A. Yes, sir, about the 20th or 21st of June.

Q. How first spoke to you about the bill of sale having been given, Gowan or Cowden?

A. Gowan.

Q. What did he way to you in the same connection when he spoke to you?

A. He said he had sold the sheep to Cowden.

Q. Give you any reason why?

A. Yes, he claimed Shaw was owing him six to eight thousand dollars and thought he ought to protect himself if he could and asked me if I blamed him for protecting himself in that way.

Q. That was about how long after he had first offered the sheep for sale to you as the Shaw sheep?

A. About ten days.

Q. That would place it about what date in June?

A. About the 20th or a day or two prior to that time.

Q. Had Gowan at any time prior or did he at any time after claim to have title to the so-called Shaw sheep?

A. He never claimed to have any title to them.

Q. Did he claim to have any interest in them whatever

(Deposition of John R. Bonson.)

other than that Shaw was owing him six or eight thousand dollars?

A. He never told me that he had any interest in these particular sheep still he referred to them as the Shaw wethers and the Shaw and Gowan sheep but he never claimed as being the owner or part owner of these sheep.

Q. You are positive that at no time prior to the 20th or at most the 18th or 19th of June, 1902, that no mention was ever made to you by either J. B. Gowan or Ralph Cowden of the fact that a bill of sale of these sheep had had been made by Gowan to Cowden?

A. No, sir, no mention had ever been made to me prior to that time.

Q. And from the time that you arrived at Caldwell on the 7th or 8th of June up to the time when you say he spoke to you about the bill of sale and asked you if you blamed him for doing what he had done as testified to by you on a day somewhere from the 18th to the 20th of June, 1902, you had talked with him how frequently?

A. Most every day.

Q. And during almost every day talked to him with reference to buying them?

A. Yes, sir.

Q. And did he ever at any time during this period say to you that he had a right to sell these sheep or had any title to them or any portion of them?

A. No, sir.

Q. How did he say he owned them, I mean prior to the

(Deposition of John R. Bonson.)

date when he told you he had given a bill of sale as mentioned by you?

A. He told me on Shaw's return he would be in a position to price the sheep to me and offer them for sale.

Q. On the date mentioned by you as when you was told by Gowan that a bill of sale had been given by him to Cowden for these sheep did he say anything to you about Shaw returning?

A. He told me that Shaw hadn't returned and that he didn't think he ever would.

Q. Had he ever indicated such a thought to you prior to that day? I mean that he wouldn't return?

A. No, sir.

Q. Had he or had he not up to the date mentioned sometime from the 18th to the 20th of June, 1902, constantly told you that he was expecting Shaw back from Portland, Oregon, any day and that he would be in a position to price the sheep to you when he came back?

A. Yes, sir, he always spoke of Shaw returning up to the date about the 18th of June, I mean the date when he told me that he had sold the sheep to Cowden and asked me if I blamed him for it.

Q. Did Gowan ever tell you anything about on what basis he took care of the Shaw sheep?

A. He at one time told me that he got a thousand dollars a year for running Shaw's sheep business.

Q. Did Gowan ever tell you about having been interested in any sheep there?

(Testimony of John R. Bonson.)

A. He told me about having an interest with Cowden in some ewes and lambs.

Q. When did he tell you that?

A. I took from his letter that I seen prior to June 7th, and he also told me on several different occasions between June 7th and June 18th or 20th.

Q. Tell you anything about on what basis he was taking care of these sheep?

A. No, sir.

Q. Didn't say anything about whether he was getting a salary of a thousand dollars a year or any other amount for taking care of these sheep?

A. No, sir.

Q. What is your age?

A. 31.

Q. What business have you been engaged in for the last 13 or 14 years principally?

A. Farming, cattle feeding, buying and selling stock and cattle, hogs and sheep feeding.

Q. With whom have you been engaged in business during most of the time?

A. With my father most of the time, whose name is Nick Bonson and who resides at Grand Island, Nebraska.

Q. For how many years have you been engaged to any extent in the business of buying and selling sheep?

A. For the last ten years.

Q. Are you familiar with the market price of sheep during that period?

(Deposition of John R. Bonson.)

A. Yes, sir.

Q. In the business of buying and selling sheep during the period mentioned how did you determine the prices at which you would sell or sold?

A. I always based the values by what they would bring at the livestock centers or sheep brought in the west should be bought at prices sufficiently low that by adding freight and other shipping expenses that they would sell on the market without a loss and whatever they net gives you the value on the range or at the western section.

Q. In selling sheep what determines you in fixing the prices at which sold where they are not sold in the principal markets?

A. All values at all times are based on what sheep will bring at the principal livestock centers as Chicago, Omaha and St. Joe and Kansas City.

Q. Do you know of sheep having a market value except as related as determined and fixed by their selling price at these markets?

A. No, sir.

Q. Do you know or have you known of sheep having a market value in Idaho or elsewhere in the last 15 years except by reference to the selling prices at these principal livestock centers at which they are sold?

A. No, sir, all sheep values are determined by what they will bring at the principal markets especially wethers, whose values are what they would bring at the principal markets and the values they would bring at the principal

(Deposition of O. W. Eaton.)

markets are as staple as corn, wheat, oats, cattle and hogs.

Q. Do you expect to be in the vicinity of Boise, Idaho, in the near future?

A. No, sir.

Q. About how far is it from here to Boise, Idaho?

A. About thirteen or fourteen hundred miles.

Witness excused.

JOHN R. BONSON.

O. W. EATON, the witness who was temporarily withdrawn by counsel for defendants, was again called and testified as follows, to wit:

(Examination by Mr. B. F. NEAL.)

Q. Where did you make your headquarters, where did you room while stopping at Caldwell, Idaho, when stopping there in the summer of 1902?

A. We stopped first at the depot hotel for two or three days and after that I lodged at Gowan's, his wife was away from home, I understood at Grand Island on a visit, we just simply slept there nights for three or four nights.

Q. You mean that after you moved there from the hotel that you just stayed there three or four nights or all the balance of the time?

A. All the balance of the time is my recollection.

Q. On or about what time did you arrive at Caldwell?

A. About the 8th.

Q. And about what date did you leave?

A. Somewhere about the 15 or 17 of June.

Q. During the time that you were stopping at Gowan's

(Deposition of O. W. Eaton.)

or at the hotel mentioned and at the time mentioned did you have any conversation with Gowan with reference to the purchase of sheep?

A. Why, I didn't have but a very little conversation, he spoke of he and Cowden running ewes and lambs together.

Q. Did he at any time state to you that he had any wethers or any interest in any wethers in the State of Idaho?

A. No, sir, never did, nothing but ewes and lambs, no wethers at all.

Q. Did you ever tell him why you were there, what your mission or business in that locality was?

A. Yes, sir, I told him we were there for the purpose of purchasing wethers to put on the market.

Q. Did he talk to you about selling you any wethers?

A. Yes, sir, he did.

Q. What wethers did he tell you about?

A. He said he had for sale, he didn't say they were his but he said he had for sale between five and six thousand wethers, this Gowan, yearlings and two year old wethers.

Q. Did you have any further conversation with him prior to the time you say you left there on or about the 15th or 17th of June, 1902, in which he told you whose sheep they were?

A. Yes, sir, I had a conversation with him later after returning from Weiser and Huntington.

Q. When did you arrive at Caldwell, Idaho?

A. On the 7th or 8th of June, 1902.

(Deposition of O. W. Eaton.)

Q. And how long did you stay there?

A. I staid there three or four days, that is until about the 11th or 12th and then went to Weiser and Huntington, being gone over night.

Q. And then where did you go?

A. Back to Caldwell, returning on the 13th or 14th, I then remained at Caldwell stopping at Gowan's until some time from the 15th to the 17th of June, 1902, when I returned home leaving John R. Bonson there.

Q. At about what date was this that you had this that you had this last conversation with Gowan that you have just testified to?

A. Sometime between the 11th and 17th, it must have been about the 14th of June, 1902.

Q. What further did he tell you with reference to the wethers near Hailey with reference to which he had spoken to you before?

A. He told me that Shaw hadn't returned and that he didn't care to sell them until Shaw returned, he didn't speak of having any interest in them at that time.

Q. Did he ever speak to you or in your presence of ever owning the title to those sheep?

A. No, sir.

Q. Who did he speak of as owning these sheep?

A. R. L. Shaw.

Q. Amout how many head of these sheep did he say there were?

A. He said there were two bands, he thought about

(Deposition of O. W. Eaton.)

2,900 in a band, he spoke as there being between 57 and 5,900.

Q. What age and description of sheep did he say they were?

A. He said they were on what we call a merino order and that some of them were rather pelty.

Q. Did he price them to you?

A. No, sir, he didn't want to price them until Shaw returned, I left that to Bonson.

Q. Did he tell you anything about Shaw's financial condition?

A. He spoke about him as being heavily in debt but didn't speak about any mortgage.

Q. Did you have any other or further conversation with Gowan, J. B. Gowan, with reference to these bands of sheep?

A. No, sir, that was all.

Q. Did you make any offer to buy them at that time?

A. No, sir, well I couldn't very well he didn't want to sell them until Shaw returned.

Q. Did he give any reason why he wouldn't sell them until Shaw's return?

A. He represented that Shaw owned the sheep and that he wouldn't sell them until he returned.

Q. About what time did you have your last conversation with him when he made such representations to you?

A. It was about the 14th or 15th of June, 1902.

(Deposition of O. W. Eaton.)

Q. Did he ever make any different representations to you at a later day?

A. No, sir.

Q. Or prior to that time?

A. No, sir.

Q. Up to the time that you left Caldwell for return to Nebraska, between the 15th and 17th as testified to by you, had Shaw returned to Caldwell or that vicinity to your knowledge?

A. No, sir.

Q. Had Gowan at any time made any figures to you or any basis on which he would sell these sheep?

A. No, sir, he never made any offer at all.

Q. Do you know how much longer John R. Bonson staid there after you left?

A. No, sir, I don't positively, he went to look at these sheep, I talked with him when he come back, it was the very last of June or the first part of July that he returned, that's my recollection.

Q. Did Bonson remain longer on account of some arrangements you had with him because of your trip west?

A. Yes, sir, we had some hopes that we would get these sheep.

Q. You didn't see the sheep yourself?

A. No, sir.

Q. Did Gowan describe the marks and brands on these sheep to you?

(Deposition of O. W. Eaton.)

A. No, sir, I didn't ask him and he didn't describe them?

Q. Did you hear Gowan say anything to Bonson about staying longer after you left?

A. Yes, sir, I heard him invite him to stay and go and look at these sheep.

Q. Did you understand why he wanted him to stay longer, stay to a later date?

A. I understood he wanted him to stay and look at these sheep, I think he wanted him to wait a few days for Shaw to return, he was expecting Shaw every day and he gave me to understand that he couldn't sell the sheep until Shaw's return.

Q. Did you ever have any conversation with Gowan with reference upon what basis he was caring for the so-called Shaw wethers over near Hailey, I mean whether or not he was receiving or was to receive any pay for his services?

A. Yes, sir, I understood him that he was at work on a salary, he didn't tell me the amount and I didn't ask him but he gave me to understand that he was taking care of them on a salary.

Q. By giving you to understand you mean do you that he was working for a salary in caring for the Shaw sheep?

A. Yes, sir.

Q. Did he tell you what if any compensation he was receiving for caring for the so-called Cowden and Gowan ewes and lambs?

(Deposition of O. W. Eaton.)

A. I understood he was in partnership on the ewes and lambs.

Q. Did he say anything about being paid for his services in caring for them?

A. Not for the Cowden ewes and lambs.

Q. Did he at any other time by direction, words or otherwise indicate that he claimed any title as a partner or otherwise in any of the so-called Shaw wethers?

A. No, sir, only simply working on a salary, no claim of title whatever.

Q. Where did he tell you the Shaw wethers were located at that time?

A. Over near Hailey in what they called the Wood River Country.

Q. Where did he tell you that the Gowan and Codwen ewes and lambs were located?

A. Up near a place or town they called Council.

It being six o'clock P. M., the further taking of the deposition is adjourned until the hour of nine o'clock A. M., on Friday, April 28, 1904, at the same place as hereinbefore described.

B. F. Neal, attorney for defendants, and the witness O. W. Eaton being present, and it being of the hour of nine o'clock A. M. of April 28, 1904 (Friday), the further taking of the deposition is continued as per adjournment, at the office of Abbott & Abbott, before O. A. Abbott, the notary public.

(Deposition of O. W. Eaton.)

(Examination by Mr. B. F. NEAL.)

Q. Did Gowan ever tell you or by any words or acts give you to understand that any person other than R. L. Shaw owned or claimed to own any of the two bands of wethers located in the Wood River country near Hailey?

A. No, sir, never did.

Q. Did he say at any time to you or in your presence that Ralph Cowden owned part of them?

A. No, sir, never mentioned his name.

Q. Did he say at any time that he himself owned part of the or had an interest in part of them?

A. No, sir.

Q. You met Ralph Cowden occasionally while there?

A. I was in his office once or twice.

Q. What business was he engaged in at that time?

A. Lumber business.

Q. Talk to him about sheep?

A. Yes, sir, he spoke about running these ewes and lambs with Gowan.

Q. Where did he say they were located?

A. I think he said they were located—if I get the direction right—north, near Council up in that country.

Q. Did he speak about having any other sheep up in Idaho other than the ewes and lambs?

A. No, sir, I didn't hear him mention any others.

Q. Did he speak to you at any time about Gowan having any sheep or any interest in any sheep except those that he owned with Cowden?

(Deposition of O. W. Eaton.)

A. No, sir.

Q. When did you have your last conversation with Ralph Cowden?

A. I think about the 14th, right about that time, I couldn't give the date, June 14th, 1902, I think.

Q. Did you have any conversation with him with reference to R. L. Shaw after that?

A. No, sir, but very little he spoke as though they expected Shaw back soon.

Q. Did you have any conversation with him with reference to Shaw's sheep being mortgaged?

A. No, sir, none at all.

Q. How old are you?

A. 68.

Q. For how many years have you been engaged in the sheep business?

A. About 30 years.

Q. What has been the nature of the sheep business that you have done during that period?

A. During that time I ran sheep in Kansas on the range with a partner, Mr. Gifford, a brother-in-law of mine, for six or eight years, and since that time my business has been confined to feeding sheep during the winter fattening them for market.

Q. How have you usually disposed of your sheep?

A. Fattened them and sold them in Omaha and Chicago.

(Deposition of O. W. Eaton.)

Q. Have you been engaged to any extent in the business of buying and selling sheep?

A. Yes, sir, to considerable extent.

Q. Give it as near as you can, for the last 15 years, describe what you have been doing?

A. Going into the western States, Idaho, New Mexico, Utah and Oregon and driving sheep through, I never drove through but once, I was connected with 14,000 and drove clear through from Oregon, bought them in Oregon and sold part of them here to feeders and fed part of them myself.

Q. What experience other than that have you had?

A. I have bought and sold to feeders considerable.

Q. About how many have you handled personally every year?

A. From six to ten thousand.

Q. Through the period mentioned by you?

A. Perhaps not every year but it would run along about that number.

Q. Upon what do you base the price or did you base the price and would have paid for sheep when buying the the prices you would have asked for and received usually when you have sold sheep?

A. On the markets in the livestock centers, principally Omaha, Chicago and St. Joe.

Q. Is there to your knowledge or has there ever been during the time during which you have handled sheep a market value for sheep except the relative market value

(Deposition of O. W. Eaton.)

with reference to the prices at which sheep are bought and sold in the general livestock sales points as at Chicago, Omaha and St. Joe?

A. Yes, sir, those are the markets we buy on, the prices we pay for sheep wherever we buy them is governed by the price at which they can be sold for on the principal markets by adding to the cost price the price of transportation from the place of purchase to the place of selling, we determine the price which we will pay.

Q. So far as you know and based upon your experience as a dealer and your general knowledge do you know of any market value in the State of Idaho or any other state for sheep except as based upon the current prices at the time in the markets of the United States as for instance Omaha, Chicago and St. Joe?

A. No, sir, I don't.

Q. Do you know of any way of arriving at the market price except by taking as a basis the current market price in these sales markets?

A. No, sir, I don't. I wouldn't attempt to buy sheep on any other basis except by taking into consideration the current prices in Chicago, Omaha and St. Joe markets.

Q. How do those current prices generally compare with each other on a given day?

A. About all the same at the different points, some may be farther away, we think we can do a little better by going to Chicago but it's about a stand off.

Q. With your experience as a sheep dealer have you

(Deposition of O. W. Eaton.)

ever bought sheep upon any other basis than upon the market price that is determined by the market price upon which sheep were selling at the principal markets?

A. No, sir.

Q. In your judgment is there any other market price than that founded upon that basis?

A. I don't know of any other way to buy sheep safely.

Q. Where is Wood River, Nebraska?

A. 16 miles west of here.

Q. And about how far from Boise, Idaho?

A. It must be 1400 miles.

Q. Have you any intention of being or will you probably be in the vicinity of Boise, Idaho, in the near future?

A. I don't think I will.

Witness excused.

O. W. EATON.

State of Nebraska,
County of Hall.

I, O. A. Abbott, a notary public duly commissioned and qualified for and residing in the county and State aforesaid, do hereby certify that O. W. Eaton and John R. Bonson were by me severally duly sworn to testify the truth, the whole truth and nothing but the truth and that the depositions by them respectively subscribed and each sheet whereof has been further verified by their respective signatures upon the margin thereof was reduced to writing on a typewriting machine by O. A. Abbott, Jr., who is not related to or counsel for either party or other-

wise interested in the result of this suit, and in the presence of each witness respectively and were by said witnesses subscribed and verified in my presence and were taken at the time and in the place in the annexed notice and agreement specified, and I further certify that I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit and that the taking of said deposition was commenced at the time in said notice specified and were continued by adjournments from day to day as set forth in the body of said depositions that is to say from the 26th day of April A. D. 1905, to the 28th day of April, A. D. 1905, both of said days included.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 28th day of April, A. D. 1905.

[Seal] O. A. ABBOTT,
Notary Public.

My commission expires Nov. 20, 1909.

FEES.

O. W. Eaton, witness:
Mileage, 16 miles.....$1.60
Witness' fees, two days..... 6.00
John R. Bonson, witness:
Mileage, 50 miles.....$5.00
Witness' fees, two days..... 4.00
Swearing witnesses, two at $.10..... .20
Certificate and seal..... .25
Transcribing depositions on typewriter.....26.60

County clerk's certificate.....
Postage and registry..... .22

Total.....$43.87

State of Nebraska,
Hall County,—ss.

I, J. L. Schaupp, County Clerk of the County aforesaid, do hereby certify that O. A. Abbott, an acting notary public within and for said County, duly qualified to act as such, that all of his official acts are entitled to full faith and credit when executed within the period named, to wit: Commencing Dec. 12th, 1903, and ending Nov. 20th, 1909, the last named date being the date of the expiration of his Commission.

In testimony whereof, I have hereunto subscribed my name and affixed the official seal of said county, at my office, this 28th day of April, 1905.

[Seal] J. L. SCHAUPP,
County Clerk.

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[Title and Caption Omitted.]

Notice to Take Depositions of O.W. Eaton and John R. Bonson.

To J. C. Mills, Jr., Plaintiff, and W. E. Borah, His Attorney:

The above-named plaintiff will take notice that on the 26th of April, 1905, the said defendants and each of them will take the depositions of O. W. Eaton and John R. Bon-

son, witnesses to be used as evidence on the trial of the above-entitled cause at the law offices of Abbott & Abbott in the city of Grand Island in the county of Hall, State of Nebraska, between the hours of 9:30 A. M. and 6:00 P. M. of said day, and the taking of said depositions will be adjourned from day to day (not including Sundays and legal holidays) between the same hours until they are completed.

MORRISON & PENCE, and
NEAL & KINYON,
Attorneys for all Defendants.

Received copy of the above notice this 15th day of April, 1905, and consent is hereby given that said depositions may be taken at the time and place in said notice specified, subject to all objections as to competency, revelancy and materiality.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Depositions of O. W. Eaton and Jno. R. Bonson. Filed May 3, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Notice to Take Deposition of George W. Hawkes.

To J. C. Mills, Jr., and W. E. Borah, his Attorney:

The above-named plaintiff will take notice that on Thursday, the 18th day of May, 1905, the defendants and each of them will take the deposition of George W. Hawkes, a witness to be used as evidence on the trial of

the above-entitled cause at the law offices of James Pardee, at the Eagle Block in the city of Salt Lake, county of Salt Lake, and State of Utah, between the hours of 9 A. M. and 6 P. M. of said day, and the taking of said deposition will be adjourned from day to day (Sundays and legal holidays excepted) between the same hours until they are completed, subject to all objections, for competency, relevancy and materiality.

MORRISON & PENCE, and
NEAL & KINYON,
Attorneys for all Defendants.

Received copy of the above notice this 10th day of May, 1905, and consent is given that said deposition may be taken at the time and place in said notice specified.

W. E. BORAH,
Attorney for Plaintiff.

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Deposition of Geo. W. Hawkes.

Deposition of sundry witness taken before me, Leonora Trent, a notary public within and for the County of Salt Lake, State of Utah, on the 27th day of May, A. D. 1905, between the hours of 9 A. M. and 5 P. M. at Room No. 6 in the Eagle Block, Salt Lake City, Salt Lake County, Utah, pursuant to the annexed Notice, to be read in evidence in behalf of the defendants in an action pending in the Circuit Court of the United States in and for the District of Idaho, Central Division, Ninth

(Deposition of George W. Hawkes.)

Circuit, County of Ada, in which J. C. Mills, Jr., late sheriff of Boise County, Idaho, is plaintiff, and American Bonding Company of Baltimore and the Flato Commission Company are defendants:

GEORGE A. HAWKES, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes and saieth, as follows:

JAMES D. PARDEE, Esqr., Attorney, appearing for the defendants, questioned the witness as follows:

Q. What is your name?

A. George A. Hawkes.

Q. Where do you reside?

A. Salt Lake City, Utah.

Q. What is your business, your occupation?

A. Travelling Freight and Livestock Agent for the Rio Grande Railroad Company.

Q. How long have you been such agent for the Rio Grande Railroad Company?

A. You mean since I left the Flato Commission Company? I believe it was the first day of July, 1901, that I went to work for them.

Q. Were you ever employed by the said Railroad Company before that time?

A. Yes, sir.

Q. When did you commence to work for them the first time, if you remember.

A. I comemnced to work for them in the Express Department in 1890 about the last of the year, and as Trav-

(Deposition of George W. Hawkes.)

eling Freight and Livestock Agent some time in July, 1895, continued to work for them until I resigned to take a position with the Flato Commission Company either in February, 1901, or 1902, as near as I can remember.

Q. What were your duties as Traveling Freight Agent or Traveling Livestock Agent for the Rio Grande Railroad Company?

A. Soliciting shipments of both dead freight and livestock for that company.

Q. While working for that said company as Livestock Agent did you gain any information as to the weight of livestock and their prices?

A. I think so.

Q. State what experience you had in getting information as to weights and prices of livestock?

A. No particular experience other than from parties making shipments of livestock east I have seen a number of shipments weighed before being loaded for the market, and also seeing accounts of sales after the parties returned, which gave me a pretty good idea of certain classes of sheep on the range.

Q. State how good your judgment got to be in judging the weight of sheep, or livestock, gained through your experience with handling sheep?

A. At the time I thought my judgment very fair.

Q. When did you commence working for the Flato Commisison Company?

A. In February, 1901, or 1902.

(Deposition of George W. Hawkes.)

Q. What were your duties in connection with the Flato Commission Company?

A. Soliciting shipments for their commission house and looking after their business in general in Utah, Wyoming, Idaho, and Nevada.

Q. How long did you work for the Flato Commission Company?

A. About two and one-half years as nearly as I can remember.

Q. During the summer of 1902, what was your knowledge as to the prices of sheep and livestock, if you had any?

A. Only from the market reports given by the different Stock Yards Papers at Missouri River points and Chicago, which reports I received nearly every day when I was at railroad points where I could receive my mail.

Q. What papers do you remember of reading?

A. The "Daily Drovers' Journal" and "Stockman," published at Omaha, a paper called The Telegram, published in Kansas City, also a livestock paper published in Chicago—at the present time I don't remember its name —also a livestock paper published in Denver, besides some market reports sent out by nearly all Commission Houses to livestock growers throughout the country, quoting markets during the shipping season, and also livestock markets published in a great many of our western papers, such as "The Salt Lake Tribune," and "The Salt Lake Herald."

(Deposition of George W. Hawkes.)

Q. During the summer of 1902, were you familiar with the local livestock market in Idaho?

A. Yes, sir.

Q. During the summer of 1902, what was the difference between the local market values of Hailey, Idaho, and the Eastern Markets?

A. I think the difference between the two markets was the cost and expense of transportation between those points plus the shrinkage on the stock.

Q. Were the markets of Idaho, and particularly near Hailey, Idaho, during the summer of 1902, practically controlled by the eastern market prices?

A. I think they were.

Q. Did you have anything to do with the band of sheep that was sold under the chattel mortgage of the Flato Commission Company by Sheriff J. C. Mills, Jr?

A. I sold some sheep that I was told was bid in by a representative of the Flato Commission Company named A. H. Bree, that were soild to him by Sheriff Mills near Council, Idaho.

Q. Those sheep that you found in the possession of A. H. Bree, state what you did with them?

A. I sold the young ewes, that is, I sold the tops or the pick of the band, or bands, to a man by the name of Baugh who lived at Shoshone, Idaho. I think there was in the neighborhood of 2,500 head of those sheep, the balance, as I remember it, was sold to a man by the name of J. B. Hunter, consisting of old ewes and lambs.

(Deposition of George W. Hawkes.)

Q. State what was the price that you received from Mr. Baugh for the sheep that were sold to him?

A. As near as I can recollect it was $2.85 per head.

Q. What price did you receive for the sheep or ewes that were sold to Hunter?

A. As near as I can recollect it was $2.00 per head for the ewes and $1.36 for the lambs.

Q. Did you make any effort to sell these sheep for any higher price than above stated?

A. Yes, sir.

Q. State what you did?

A. I tried several different times to get parties to go and look at these sheep at a higher prce but was unable to get any one to do so.

Q. How did these prices that you got for the sheep that you sold to Hunter and Baugh compare with the "River" prices for similar sheep at that time?

A. I think very favorably.

Q. What would constitute the difference between "River" prices and Council, Idaho?

A. I figure, the cost of transportation and shrinkage between those two points.

Q. Do you remember now what your judgment was at the time as to what the lambs weighed that were sold to Hunter?

A. As near as I can remember, my estimate at the time was about fifty pounds on the "River" market, which

would make about eight or ten pounds more on the range.

GEORGE A. HAWKES.
Witness.

I, Leonora Trent, notary pubilc in and for the County of Salt Lake, State of Utah, do hereby certify that George A. Hawkes, was by me duly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by myself (not being interested in the suit), in the presence of the witness and was subscribed by said witness in my presence, and was taken at the time and place in the annexed notice specified. That I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit; and that said deposition was commenced at the time specified in said notice and continued without adjournment on said day.

In witness whereof I have hereunto set my hand and seal this twenty-seventh day of May, A. D. 1905.

[Seal] LEONORA TRENT,
Notary Public in and for Salt Lake County, State of Utah.

My commission exvpires November 22, 1905.

Fees for taking depositions, $6.10 in both cases.

[Endorsed]: No. 249. Deposition of Geo. W. Hawkes. Filed June 2d, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

J. C. MILLS, Sheriff,

Plaintiff,

vs.

FLATO COMMISSION COMPANY, and THE AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants.

Objections to the Deposition of Ed. H. Reid.

Comes now the plaintiff and objects to all and the entire answer of Ed. H. Reed in his deposition in answer to the following question: "What was the reason that the bond in question was given?" and for grounds of said objection says:

1. That said answer and testimony is incompetent, irrelevant and immaterial.

2. That it does not show or tend to show that the bond in question was improperly demanded or that the same was illegal or void or obtained by extortion or under color of office.

3. For the reason that the said sheriff had a right to demand of the Flato Commission Company a bond before proceeding to foreclose the chattel mortgage in question.

4. For the reason that the said statements of the witness are contrary to the recitals in the bond, and that the defendants are estopped to contradict the recitals in said bond.

The plaintiff objects especially to that portion of the statement of the witness in answer to the question "What

was the reason that the bond in question was given,'' beginning with the sentence ''When I returned I was informed by Mr. J. H. Hawley and also by Mr. Hawkes,'' etc., and ending with the words, inclusive, ''Because of the fact that Sheriff Mills refused to do any act or thing whatever in and about the making of said levy until so indemnified,'' for the reason—

1. That the same was incompetent, irrelevant and immaterial.

2. That it is hearsay and a conclusion of the witness and does not prove or tend to prove any material issue in this case.

The plaintiff objects especially to that portion of the deposition in answer to the question ''What is the reason that the bond in question was given,'' beginning with the commencement of the answer of the witness thereto and ending with the words, ''Growing out of the conversation between Mr. Hawley and Mr. Hawkes and myself on the one part and Sheriff Finney on the other, the amount of the bond was at the time fixed at $10,000,'' for the reason—

1. That all of said matter relates alone to the matter of the giving of the bond to the sheriff of Blaine County, William Finney, and not to the sheriff in this case, J. C. Mills, and is hearsay as to this case, incompetent, irrelevant and immaterial.

2. That it does not prove or tend to prove any issue in this case.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Objections to the Deposition of Ed. H. Reed. Filed June 2d, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Objections to the Deposition of James C. Dahlman.

Comes now the plaintiff and makes the following objections to the testimony of James C. Dahlman in said Dahlman's deposition, to wit:

1. Plaintiff objects to all of the testimony or evidence of said James C. Dahlman for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the matter of the value of the sheep in question has been fixed and determined by the judgment in the case of Ralph Cowden vs. J. C. Mills, Jr., in the District Court of the Third Judicial District of the State of Idaho in and for Canyon County, and that the judgment in said case is conclusive and binding upon the defendants in this case.

2. Objects to the answer to the following question upon page 3 of said deposition, "What would be the value of wethers one and two years old in the State of Idaho, having reference to the price at which they would sell upon the market as at Omaha, St. Joe or Kansas City, for the season that the same is irrelevant, incompetent and immaterial, and for the further reason that the judgment in the case of Mills vs. Codwen in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County is conclusive upon these defendants and

has established the value of said sheep and the amount which the plaintiff in this case is entitled to recover.

3. Objects to all the testimony thereafter given by said witness as to the price or value of the sheep covered by the suit in the case of Mills vs. Cowden in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County for the reason that in this case it is incompetent, irrelevant and immaterial, that the judgment in said case of Mills vs. Cowden is conclusive and binding upon these defendants and has established the value of said sheep and the amount which the plaintiff is entitled to recover in this case.

4. Objects to the testimony of said witness showing the amount realized from the sale of the sheep in question for the reason that the same is incompetent, irrelevant and immaterial and is not binding upon this plaintiff and does not constitute a measure of damages in this case and is not the proper method of establishing the liability of these defendants.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Objections to Deposition of James C. Dahlman. Filed June 2d, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Objections to the Depositions of O. W. Eaton and John R. Bonson.

Comes now the plaintiff and makes the following objections to the testimony of O. W. Eaton and John R. Bon-

son, in the depositions of said Eaton and Bonson, to wit:

1. Plaintiff objects to the testimony of O. W. Eaton as given in his deposition for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that all matters and things covered by said testimony were and are determined by the judgment in the case of Ralph Cowden vs. J. C. Mills, Jr., in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, and for the further reason that said judgment is conslusive and binding upon the defendants in this case.

2. Plaintiff objects to the testimony of John R. Bonson as given in his deposition for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that all matters and things covered by said testimony were and are determined by the judgment in the case of Ralph Cowden vs. J. C. Mills, Jr., in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, and for the further reason that said judgment is conclusive and binding upon the defendants in this case.

3. Objects to the answer of the following question, "Did you have any correspondence with Gowan during the year 1902, or did you see any correspondence from him with reference to having any sheep to sell," for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the ownership of said sheep has been litigated and determined by the judgment in the case of Cowden vs. Mills above referred to.

4. Objects to the answer of the following question, "What sort of sheep did he say in his letter he had to sell," for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the ownership of said sheep has been litigated and determined by the judgment in the case of Cowden vs. Mills above referred to.

5. Objects to all the testimony of said John R. Bonson wherein he attempts to relate the conversation with J. B. Gowan upon pages 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, of said deposition, for the reason that the same is incompetent, irrelevant and immaterial and in concerning and touching a matter that was litigated and determined in the case of Cowden vs. Mills above referred to, and for the further reason that the judgment in the case of Cowden vs. Mills is conclusive in all matters concerning which said testimony is given, and is conclusive as to the amount which the plaintiff in this case may recover and as to who the owner of the sheep in question was.

7. Plaintiff objects to the testimony of O. W. Eaton relative to the conversation with Gowan or Cowden related in his testimony on pages 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, for the reason that the same is incompetent, irrelevant and immaterial and is concerning and touching a matter that was litigated and determined in the case of Cowden vs. Mills above referred to, and for the further reason that the judgment in the case of Cowden vs. Mills is conclusive in all matters concerning which said testimony is given and is conclusive as to the amount which

the plaintiff in this case may recover, and as to who the owner of the sheep in question was.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Objections to the Testimony in the Depositions of O. W. Eaton, and John R. Bonson. Filed June 2d, 1905. A. L. Richardson, Clerk.

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[Title and Caption Omitted.]

Objections to the Deposition of George A. Hawkes.

Comes now the plaintiff and objects to the deposition of George A. Hawkes and all of the testimony of said Hawkes in said deposition, for the reason that the same is incompetent, irrelevant and immaterial and does not prove or tend to prove any of the issues in this case, and for the further reason that the matters to which said testimony in said deposition relates was involved in the case of Cowden vs. the above named plaintiff in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, and that the judgment in said case is conclusive upon said matter and binding upon these defendants, and they cannot relitigate or retry said matters.

Plaintiff especially objects to that portion of the testimony of said George A. Hawkes wherein it is attempted to show the value of the sheep in question for the reason that the same question was involved in the case of Cowden vs. Mills aforesaid and the evidence was incompetent, ir-

relevant and immaterial, said judgment in said case being conclusive and binding upon these defendants.

Plaintiff objects to that portion of the testimony of George A. Hawkes upon page 4 of the deposition and contained in his second answer upon said page, for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the judgment in the case aforesaid is binding and conclusive upon these defendants.

Plaintiff objects to the testimony of said Hawkes in his third and last answer upon page four and continued to page five, for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the judgment in the case aforesaid is binding and conclusive upon these defendants.

Plaintiff further objects to the last three answers of said Hawkes, for the reason that the same is incompetent, irrelevant and immaterial, and for the further reason that the judgment in the case aforesaid is binding and conclusive upon these defendants.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: No. 249. Objections to the Deposition of George A. Hawkes. Filed June 2d, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Central Division, District of Idaho.

J. C. MILLS, JR.,

Plaintiff,

vs.

THE AMERICAN BONDING COMPANY OF BALTIMORE, et al.,

Defendants.

Testimony.

Appearances:

For the Plaintiff, W. E. Borah and F. J. Smith.

For the Defendant, B. F. Neal and John T. Morrison.

Boise, Idaho, June 3, 1905.

By Mr. MORRISON.—It is stipulated and agreed by and between the parties hereto that either party may have 60 days from and after notice of filing of the judgment of the Court in which to prepare and serve and file statement of facts and bill of exceptions or any of said papers and instruments on motion for a new trial herein.

It is further stipulated and agreed that either party, as the case may be, may have ten days after the filing of all or any of said papers in which to prepare and serve amendments and counter statements thereto.

It is further stipulated and agreed that all objections made by the defendants, or either of them, shall at the option of the defendants, apply to either or both.

B. E. HYATT, duly called, sworn and examined, testified as follows:

(Testimony of B. E. Hyatt.)

Direct Examination.

(By Mr. BORAH.)

By Mr. MORRISON.—At this point we would like to have the record show that the defendants and each of them object to the introduction of any evidence for the reason that the complainant fails to state facts sufficient to constitute a cause of action against the defendants or either of them.

By the COURT.—There has been a demurrer in this case which was overruled in the State court raising these questions, has there not?

By Mr. MORRISON.—Yes.

By the COURT.—Then I do not wish to pass upon these questions again. The motion, of course, will be overruled.

By Mr. MORRISON.—Exception.

By the COURT.—You desire that to apply to all of the witnesses?

By Mr. MORRISON.—Yes, sir.

Q. What official position do you hold in this State?

A. Chief Clerk in the Secretary of State's office.

Q. The Secretary of State is absent from the city?

A. Yes, sir.

Q. As such assistant have you charge of the records and archives of the Secretary of State's office?

A. I have.

Q. Have you in your possession the Articles of Incorporation of the defendant company, the American Bonding Company?

(Testimony of B. E. Hyatt.)

A. Yes, sir.

By Mr. BORAH.—Now, I wish to introduce in evidence the Articles of Incorporation of the defendant company as filed with the Secretary of State, with leave to make a certified copy for the purpose of showing the change of name of the company.

By Mr. NEAL.—We do not care to make any objection as to the competency of the offer. We simply say it is irrelevant and immaterial.

Q. You may state if the paper which you have just handed me is that paper which you have just referred to, the Articles of Incorporation of that Company?

A. Yes, sir.

By Mr. BORAH.—We now offer this in evidence, asking leave at the same time to withdraw the original and substitute a certified copy. We will ask to have this recognized as Exhibit "A." What I desire to show is the time at which the articles were filed and the change of the name of the company from its original name under which they signed this bond to the present name under which they brought suit. We desire to show at this time, by the record of the Secretary of State's office that the defendant Bonding Company duly filed its Articles of Incorporation as required by the Statutes of the State of Idaho and the Constitution and designated its agent; said filing being made on the 11th day of April, 1903, and that the said Articles of Incorporation as filed, disclose that the change of name of the Company from the original name under

(Testimony of B. E. Hyatt.)

which the Articles were filed to its present name was made by authority of the legislature of the State of Maryland.

By Mr. NEAL.—That is admitted.

By Mr. BORAH.—I will say The American Bonding and Trust Company is identical with the American Bonding Company. We offer now a certified copy of the filing of the designation of the agent and the change of the name of the agent; that is a certified copy.

(Same is admitted in evidence and marked Plaintiff's exhibit "B.")

By Mr. NEAL.—We object to that as immaterial and irrelevant.

By the COURT.—The objection is overruled.

By Mr. NEAL.—We will take an exception.

Q. Now, Mr. Hyatt, the copy which we have introduced discloses that the original agent, as designated by the company, was Charles F. Neal. You may state the date at which that designation was changed and by whom it was changed?

A. On November 25th, 1904, the American Bonding Company filed designation of agent and acceptance of the provisions of the Constitution, designating Harry S. Worthman, Boise, Idaho, as Statutory Agent of the Company.

Q. Prior to that time Charles F. Neal had at all times been agent since they had been doing business in the State?

A. Yes, sir.

(Testimony of John Tucker.)

Cross-examination. (Waived by Defendants.)

Witness excused.

JOHN TUCKER, duly called, sworn and examined, testified as follows:

Direct Examination.

(By Mr. BORAH.)

Q. What is your full name?

A. John A. Tucker.

Q. What official position do you hold?

A. Clerk of the District Court of Canyon County, Idaho.

Q. And as such you have charge of the records and files of the District Court of that county?

A. Yes, sir.

Q. I will ask you to state whether or not you have with you the registry of judgment and the journal showing the entry of judgment?

A. I have.

Q. You may refer to the first entry in the book. What is the book which you have in your hand?

A. Judgment Book Number Two, District Court, Canyon County, Idaho.

Q. Is there in that book an entry of judgment in the case of Cowden versus J. C. Mills?

A. There is.

Q. Turn to that page?

A. Yes, sir, there is.

(Testimony of John Tucker.)

Q. Now, in connection with that book, you may state what the paper is you have in your hand?

A. It is the judgment-roll filed in the case of Ralph Cowden against J. C. Mills, Jr., Sheriff of Boise County, Idaho.

Q. Is that part of the records of your office?

A. It is.

Q. This is the original judgment-roll in that case?

A. Yes, sir.

By Mr. BORAH.—We now offer in evidence the judgment-roll in the case of Ralph Cowden versus J. C. Mills, Jr., Sheriff of Boise County, being the original judgment-roll in that case, taken from the records and filed of the clerk of the Court.

By Mr. NEAL.—To which the defendants and each of them object for the reason that no proper notice, and in fact no notice at all to either of the defendants has been shown, and that the proposed offer is in an attempt to show a judgment in an action wherein, so far as the record now shows, there has been no notice between the plaintiff and defendants in that action and the plaintiff in this action and the defendants in this action, and is therefore incompetent, irrelevant and immaterial.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

Q. Upon what page of that book does the judgment appear in this case?

A. Page 120.

(Testimony of John Tucker.)

By Mr. NEAL.—We will interpose the same objection as last stated.

By the COURT.—I make the same ruling.

By Mr. NEAL.—Exception.

Q. What is the number of that book?

A. Number Two.

Q. What is the book called?

A. It is called judgment-book, District Court.

By Mr. BORAH.—We offer in evidence the page referred to in volume 2 of the Judgment Book, and ask permission to make a certified copy of the same.

Q. Now, you may state whether or not you have the entry-book with you?

A. I have.

Q. You may refer to that book and to the page where this judgment is entered. What is the page?

A. The pages are not numbered, Mr. Borah.

Q. What is the title of the book and how is it lettered or numbered?

A. Judgment book, District Court, Number One, Canyon County.

Q. Now, is there an entry in that book with reference to this Judgment?

A. I beg your pardon. Did I say "Judgment-Book?"

Q. Yes?

A. I mean, "Judgment Docket."

Q. Now, is there an entry in that docket with reference to this Judgment?

(Testimony of John Tucker.)

A. There is.

By Mr. BORAH.—We will ask that the clerk read into the record that entry.

By Mr. NEAL.—To which the defendants and each of them object for the reason that the offer which it is proposed to introduce is a Judgment between the plaintiff in this action and one Ralph Cowden, and it is not shown in this action either that there has been notice of any kind given by this plaintiff to either of the defendants in this case, or that there is any privity of any contract or other relation between the defendants in this case or either of them and the plaintiff in the former case, and for those reasons incompetent, irrelevant and immaterial.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

A. (Reading:) "Judgment debtor, J. C. Mills, Jr., Sheriff of Boise County, Idaho. Judgment Creditor, Ralph Cowden. Amount, $19,195.87. Costs, $145.15. Time of entry, June 20, 1903. Page of Judgment-Book, book 2, page 120."

Q. You may state whether or not your records disclose any satisfaction or payment of that Judgment, or any part of it?

A. They do not.

Q. The date of that entry is June 20, 1903?

A. Yes, sir.

Cross-examination (Waived by Defendants.)

Witness excused.

(Testimony of J. C. Mills, Jr.)

J. C. MILLS, JR., duly called, sworn and examined, testified as follows:

Direct Examination.

(By Mr. BORAH.)

Q. Mr. Mills, you were at one time sheriff of Boise County?

A. Yes, sir.

Q. Were you sheriff of Boise County during the time at which the Flato Commission Company foreclosed a mortgage upon certain sheep alleged to belong to R. L. Shaw?

A. Yes, sir.

Q. As such sheriff and did you act in such matter?

A. Yes, sir.

Q. You are the party then who was the defendant in the case of Ralph Cowden vs. J. C. Mills, Jr., Sheriff of Boise County?

A. Yes, sir.

Q. You may state who first called your attention to the matter of foreclosure and desired your action in the premises?

A. Mr. Hawley.

Q. In what respect did he call your attention, by letter or by telephone?

A. By telephone.

Q. Did he afterwards furnish you the papers upon which to proceed to foreclosure?

A. Yes, sir.

(Testimony of J. C. Mills, Jr.)

Q. I will ask you to state, Mr. Mills, if these papers which I now hand you are the papers in the foreclosure proceedings which you have referred to in the foreclosure of the chattel mortgage of the Flato Commission Company at the request of Mr. Hawley? (Handing witness papers.)

A. Yes, sir.

Q. These are the papers then constituting your authority to proceed in that foreclosure matter?

A. Yes, sir.

Q. An affidavit which was furnished you by Mr. Hawley?

A. Yes, sir.

Q. And these papers you afterwards caused to be filed

A. Yes, sir.

Q. And your return upon that affidavit of foreclosure? with the clerk of the Court?

A. Yes, sir.

By Mr. BORAH.—We now offer these in evidence.

(By Mr. NEAL.)

Q. Are those all the papers you received from Mr. Hawley or any other person? I mean, of course, in relation to this matter?

A. Well, I have received letters from him.

Q. Who were the letters signed by?

A. Signed by Mr. Hawley.

Q. Was not there a notice in with those directing you to do certain things?

A. Yes.

(Testimony of J. C. Mills, Jr.)

By Mr. BORAH.—I have that notice, we will produce it.

By Mr. NEAL.—The defendants and each of them object to the above offer for the reason that it is not shown that there is any privity between these defendants and the plaintiff in this action, and for that reason the papers proposed to be introduced are not evidence of the liability against these defendants or either of them, and for that reason incompetent, irrelevant and immaterial.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(Same is admitted in evidence and marked Plaintiff's Exhibit "D.")

(By Mr. BORAH.)

Q. Did you receive in company with those papers the foreclosure affidavit and letter from Mr. Hawley?

A. Yes, sir.

Q. Of the firm of Hawley, Puckett & Hawley?

A. Yes, sir.

Q. (Paper handed witness.) You may state whether or not that is the letter which accompanied the foreclosure affidavit?

A. Yes, sir.

By Mr. BORAH.—We offer this letter in evidence.

By Mr. NEAL.—The same objection as last made.

By the COURT.—The same ruling.

(Same is admitted in evidence and marked Plaintiff's Exhibit "E.")

(Testimony of J. C. Mills, Jr.)

By Mr. NEAL.—Exception.

Q. Did a formal notice accompany this letter?

A. Yes, sir.

Q. You may state whether or not that is the notice which accompanied the letter?

A. It was.

By Mr. BORAH.—We offer this in evidence.

By Mr. NEAL.—Same objection.

By THE COURT.—Same ruling.

By Mr. NEAL.—Exception.

(Same is admitted in evidence and marked Plaintiff's Exhibit "F.")

Q. There is a bond referred to in that letter. You may state whether or not the paper handed you is the bond that is referred to in the letter.

A. It is.

Q. This is the original bond?

A. Yes, sir.

Q. The bond which was sued upon in this action?

A. Yes, sir.

By Mr. BORAH.—We now offer in evidence the original bond.

By Mr. NEAL.—To which defendants and each of them object for the reason that the bond proposed to be introduced in evidence is a bond not authorized by the State of Idaho, and that the giving of such bond is contrary to the policy of the law of the State of Idaho, and it is, for those reasons, incompetent, irrelevant and immaterial.

(Testimony of J. C. Mills, Jr.)

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(The same is admitted in evidence and marked Plaintiff's Exhibit "G.")

Q. Now, Mr. Mills, I notice in the letter which Mr. Hawley sent to you he states that Mr. Bree will appear as the agent of the Flato Commission Company and meet you at Lardo. Did Mr. Bree meet you there?

A. Yes, sir.

Q. Did Mr. Bree remain with you until you took possession of those sheep, which were afterwards involved in the litigation between Cowden and yourself?

A. Yes, sir.

Q. Who was with you then as the representative of the Flato Commission Company pointing out the sheep which you were to take possession of at the time you took possession of them?

A. Mr. Bree.

Q. How long did Mr. Bree remain with you?

A. All during the time I had the sheep advertised.

Q. Was he there at the time of the sale of the sheep?

A. Yes, sir.

Q. To whom were the sheep sold?

A. To the Flato Commission Company.

Q. Who bought them in for the Flato Commission Company?

A. Mr. Bree.

Q. The same party who is referred to in the letter of

(Testimony of J. C. Mills, Jr.)

Mr. Hawley and who met you at Lardo in the first instance?

A. Yes, sir.

Q. Now, are these the same sheep then which were afterwards involved in the controversy between Mr. Cowden and yourself?

A. They are.

Q. Mr. Cowden afterwards brought suit against you?

A. Yes, sir.

By Mr. NEAL.—Defendants and each of them object for the reason before given, that it is not shown there is any privity in the contract, or otherwise, between Ralph Cowden and the defendants in this case.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

Q. When that suit was filed were papers served on you?

A. Yes, sir.

Q. To whom did you send the papers as attorney?

By Mr. NEAL.—Same objection.

A. Mr. Hawley.

Q. Whose attorney was he?

A. Flato Commission Company.

Q. Did you at that time or about the time the suit was brought serve any notice of the bringing of the suit upon the agent of the American Bonding Company?

A. I did.

Q. You may state whether or not the paper handed you

(Testimony of J. C. Mills, Jr.)

is the notice which you have referred to as having served upon the agent of the American Bonding Company?

A. It is.

By Mr. BORAH.—We offer in evidence the notice which Mr. Mills gave the American Bonding Company of the suit, dated August 29, 1903.

By Mr. NEAL.—To which the defendants and each of them object for the reason that the purported notice is not such a notice as is contemplated by law, and is for that reason incompetent, irrelevant and immaterial, it being no more than such information as may have been gleaned from a newspaper.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(Same is admitted in evidence and marked Plaintiff's Exhibit "H.")

Q. That is your signature, Mr. Mills? (Referring to paper just introduced.)

A. Yes, sir.

Q. Now, when these papers were served upon you in the case of Cowden vs. Mills, to what attorneys did you send the papers?

A. Mr. Hawley.

Q. As whose attorney?

A. Flato Commission Company's.

Q. Who prepared the answer in this case for you?

A. Mr. Hawley.

Q. Who had charge of the case as attorneys?

(Testimony of J. C. Mills, Jr.)

A. Mr. Hawley.

Q. Do you know Judge Van Dusen?

A. Well, I met him at Caldwell.

Q. Of Omaha?

A. Yes.

Q. Was he present at the trial of the case?

A. Yes, sir.

Q. Did he appear as your attorney?

A. No, sir.

Q. Did you employ any attorneys in this case at all as a matter of defense?

A. No, sir.

Q. Who employed the attorneys?

A. The Flato Commission Company.

Q. Was there an appeal of this case to the Supreme Court?

A. There was.

Q. Whose attorney had charge of the appeal?

A. The Flato Commission Company's.

Q. Did you at any time employ counsel at any stage of this litigation, or was the matter in the hands of the attorneys employed by the Flato Commission Company?

A. I didn't employ any lawyers at all.

By Mr. BORAH.—In this connection we offer in evidence the remittitur from the Supreme Court affirming the appeal of the judgment.

By Mr. NEAL.—We make the same objection.

By the COURT.—The objection is overruled.

(Testimony of J. C. Mills, Jr.)

By Mr. NEAL.—Exception.

Q. Has the judgment in the case of Ralph Cowden versus J. C. Mills, Jr., been paid, or any part of it?

A. No, sir, it has not.

Q. It is still standing there as a demand against you?

A. Yes, sir.

By Mr. BORAH.—Now, we desire to offer in evidence a letter from the General Attorney of the American Bonding Company acknowledging receipt of the notice.

By Mr. NEAL.—We make the same objection that we made to the introduction of the Mills letter.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(The same is admitted in evidence and marked Plaintiff's Exhibit "J.")

By Mr. BORAH.—We now offer in evidence a copy of a letter which was identified upon the former trial—in the State Court, rather—wherein this notice was transmitted to the Bonding Company.

By Mr. NEAL.—Same objection as to the preceding.

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(Same is admitted in evidence and marked Plaintiff's Exhibit "K.")

By Mr. BORAH.—I desire to offer in evidence now a letter from Mr. Smith, the General Attorney, addressed to myself, which was introduced in the former case.

By Mr. NEAL.—We make the general objection.

(Testimony of J. C. Mills, Jr.)

By the COURT.—The objection is overruled.

By Mr. NEAL.—Exception.

(The same is admitted in evidence and marked Plaintiff's Exhibit "L.")

Cross-examination.

(By Mr. NEAL.)

Q. Mr. Mills, I believe you stated you had some conversation with Mr. Hawley over the phone?

A. Yes, sir.

Q. When was this conversation over the phone with reference to the time you received the papers?

A. Well, I should think it was on the 26th of July.

Q. That is the day you had the talk with him?

A. Yes, sir.

Q. What time of day did you have that talk?

A. About ten o'clock, I think, as near as I remember.

Q. Did you have any conversation at that time with reference to the matter of a bond?

A. Yes, sir.

Q. Did he call you up or you him?

A. He called me up.

Q. For what purpose did he call you up?

A. He told me he wanted me to foreclose a chattel mortgage upon a certain band of sheep.

Q. Did he tell you who claimed them and who had given the mortgage?

A. Yes, sir.

(Testimony of J. C. Mills, Jr.)

Q. And in reply to that request what did you tell him?

A. What about?

Q. When he told you what he wanted you to do?

A. He told me he would send these papers up and wanted me to start as soon as possible after I received them.

Q. When he told you he would send up an affidavit and notice of the foreclosure of a mortgage given by R. L. Shaw to the Flato Company, you told him all right to send it along?

A. Yes, sir.

Q. You made no other request of him or any demand on him at all?

A. No, sir, I did not.

Q. Did you receive the affidavit and notice before you received the bond?

A. No, sir, I received them all in the same letter—same envelope.

Q. Did you receive any affidavit and notice prior to that time?

A. I did not.

Q. Did you have any conversation prior to that time with reference to an affidavit and notice?

A. Prior to what time?

Q. Well, the 26th of July.

A. No, I did not receive them on the 26th.

Q. When did you receive them?

(Testimony of J. C. Mills, Jr.)

A. Well, I think on the 27th,—the next day, if I remember right.

Q. You made a demand that there should be a bond of indemnity did you not?

A. No, sir.

Q. Was it a voluntary act on the part of Mr. Hawley to offer you a bond?

A. Yes, sir.

Q. How do you come to allege in the complaint in this case that you received an affidavit and notice and levied on a band of sheep, and thereafter demanded a bond?

By Mr. BORAH—We don't say, "and thereafter demanded a bond." We admit that we allege that we dedemanded a bond.

Q. When did you demand a bond, Mr. Mills?

A. I didn't demand any bond.

Q. You swore to this complaint in this court, didn't you? I mean when it was filed in the District Court?

A. Yes.

Q. Which statement is correct, the statement in the complaint or the statement you make here?

A. I can state the conversation I had with Mr. Hawley.

Q. Very well.

A. He called me up and told me he wanted me to foreclose a certain chattel mortgage on some sheep, and that he would send the bond up with some papers by another party, and he mentioned that party as Mr. Cowden. That

(Testimony of R. A. Cowden.)

is the substance of the conversation. I made no demand whatever for the bond. He simply told me he would send it up with the papers, and for me to foreclose.

Q. This Mr. Bree who was there, where is he now?

A. I don't know. I heard he was dead.

Reirect Examination.

(By Mr. BORAH.)

Q. The conversation which you had with Mr. Hawley in the first instance was on the 26th?

A. Yes, sir.

Q. The papers followed in due course of mail thereafter?

A. Yes, sir.

Q. Upon the 26th, he first mentioned to you what he wanted you to do?

A. Yes, sir.

Q. Over the telephone?

A. Yes, sir.

Q. And stated that he would send the bond as there would be a claim by another party for the sheep?

A. Yes, sir.

(Witness excused.)

R. A. COWDEN, duly called, sworn and examined, testified as follows:

(Testimony of R. A. Cowden.)

Direct Examination.

(By Mr. BORAH.)

Q. You are the party who was plaintiff in the case, the record of which has been introduced in evidence, of Cowden vs. Mills?

A. Yes, sir.

Q. And the party who claimed the sheep Mr. Mills took possession of on the foreclosure of the Flato Commission Company?

A. Yes, sir.

Q. And you afterwards brought suit for the value of those sheep?

A. Yes, sir.

Q. That is the suit that is referred to?

A. Yes, sir.

Q. Has the judgment in that case been satisfied or any part of it paid?

A. No, sir.

Q. It is still uncollected?

A. Yes, sir.

Q. It is still due and owing to you then as the plaintiff in that case?

A. Yes, sir.

Cross-examination. (Waived by defendants.)

(Witness excused.)

At this time plaintiff rests.

By Mr. NEAL.—Defendants and each of them move to strike out such portions of the testimony of J. C. Mills, Jr., as relates to the giving of the bond, for the reason that it is at variance with the pleadings in this case, the allegations of the pleadings being that they received the papers, levied, and thereafter demanded a bond; proof having been offered that they were given at the same time and received by him at the same time.

By the COURT.—The motion is overruled.

By Mr. NEAL.—Exception.

By Mr. MORRISON.—We wish to interpose or give notice of a demurrer to the evidence at this point.

By the COURT.—I think you have already done that.

By Mr. MORRISON.—We have, but we wish to specify more particularly. The defendants and each of them demurrer to the evidence adduced, for the reason that it does not establish or tend to establish facts sufficient to constitute a cause of action against the defendants or either of them. It shows first, that the bond was demanded and given in a case where the sheriff was fully protected by a process fair upon its face, and one which it was his duty under the law to execute; second, that there was a failure of any notice to the American Bonding Company sufficient to make the alleged judgment recovered against the plaintiff binding against said company. Third, that the bond upon which this action was brought was taken in a case in which the sheriff was

unauthorized by statute or by any law to demand a bond and the taking was contrary to the policy of the law.

By the COURT.—The demurrer is overruled.

By Mr. MORRISON.—To which the defendants and each of them except.

By Mr. NEAL.—We desire to offer in evidence the deposition of Ed. H. Reed.

In ruling upon Mr. Neal's offer to introduce the deposition of Ed. H. Reed, the Court said: "In this case the Flato Commission Company, was the principal and the American Bonding Company was the surety. I hold that it is bound by the judgment as rendered in the first trial, and that the evidence offered here, in so far as it tends to establish a different value for the sheep than that found in the State Court, cannot be regarded as evidence, and will be excluded. Now, if there is anything in the evidence applicable to other issues of the case I will not rule upon it. I only rule as to the evidence that has been discussed here—the evidence that tends to contradict the value of the sheep as found in the State Court; and the motion to that extent is sustained.

By Mr. NEAL.—We understand from the ruling, then, that we are precluded from putting in any evidence which goes to value?

By the COURT.—Any evidence that changes the value as found in the trial previously had in the State Court.

By Mr. NEAL.—Then the only question which we can put in evidence is the question of extortion in the procurement of the bond? We plead that the bond was extorted. Is that precluded also by the ruling on the other?

By the COURT.—That is not connected with this matter. I have no ruling to make upon that; there is no offer of that kind?

By Mr. NEAL.—No, sir. We make an offer of these various depositions and take the Court's ruling.

By the COURT.—The ruling on that is that the depositions in so far as they would tend to contradict the value as found in the State Court, the judgment in the State Court will be sustained—that is, the motion to that extent will be sustained.

By Mr. NEAL.—All the depositions go to the point of ownership except Reed's.

By the COURT.—The ruling is that they shall be excluded, and you can take your exceptions.

By Mr. NEAL.—We offer the deposition of John R. Bonson, O. W. Eaton, Geo. W. Hawkes and the deposition of James C. Dahlman. And we also offer the testimony of C. J. Dressler and Ed. Paine to prove the following facts: First, that Ralph Cowden was not the owner of the sheep in controversy and that they were the property of R. L. Shaw, mortgagor. Second, that whatever interest, if any, Ralph Cowden acquired or had in the sheep in controversy was attained with the actual knowledge of the fact that they were mortgaged to the Flato Commission Company by R. L. Shaw and that they were his property. Third, that the judgment in the case of Cowden against Mills, which is pleaded in the complaint in this action, is excessive and does not show the true value of

the sheep, and that the true value of said sheep was at said time not in excess of $14,000, and that that was the total amount of damages to the Plaintiff under the circumstances. Which facts defendants offer to establish by the depositions which have just been tendered and by the oral testimony of said defendant Paine and C. J. Dressler.

By Mr. BORAH.—As far as the offer of the depositions are concerned our objections to them are all in writing and of record, and the depositions all relate to the questions of value or ownership, both of which questions were adjudicated in the judgment in the case of Cowden versus Mills. Therefore, we will rest on our objections to the depositions—on the written objections. As to the objections to the testimony of these witnesses, we object to that for the reason that it is incompetent, irrelevant and immaterial, as it relates to matters and things which were adjudicated and determined by the judgment in the case of Cowden vs. Mills, and for the further reason that the judgment in the case of Cowden vs. Mills is conclusive upon all questions of ownership and value and is binding upon these defendants.

By the COURT.—I have already ruled upon the objections to the depositions, and I repeat the ruling and make the same ruling as to the offer of the oral testimony; in other words, I sustain the objection that is now made to the offer.

By Mr. NEAL.—Give the defendants and each of them an exception.

We now offer the deposition of Ed. H. Reed.

By Mr. BORAH.—That relates to the question of what they term extortion. We have certain written objections to that deposition. But we are willing, if counsel are willing, that this deposition may be taken subject to these objections. The purport of this deposition is to the effect that Mr. Mills refused to levy, or, make the foreclosure, rather, until the bonds were given. This is a question which your Honor ruled upon once before.

By the COURT.—That goes to the point that the statute does not provide for a bond?

By Mr. BORAH.—Yes.

By the COURT.—I may as well rule upon that now without delay, so if that is the point of the deposition I will sustain the objection to the introduction of the deposition.

By Mr. NEAL.—The point in the testimony is to the question of extortion in obtaining the bond.

By the COURT.—You mean by that that he had no right to demand the bond?

By Mr. NEAL.—Yes.

By the COURT.—I hold that he had the right to demand the bond. If counsel objects to that on that ground I sustain the objection to the offer.

By Mr. NEAL.—Exception.

State of Idaho,
County of Ada,—ss.

I hereby certify that the above and foregoing transcript is a true, correct and complete copy of the oral evidence

in the above entitled case taken by me as stenographer in said case.

H. M. BRENEN.

[Endorsed]: No. 249. U. S. Circuit Court, Central Division, District of Idaho. J. C. Mills, Jr., vs. American Bonding Company of Baltimore, et al. Testimony. Filed Nov. 28, 1905. A. L. Richardson, Clerk.

Plaintiff's Exhibit "C."

In the District Court of the Third Judicial District of the State of Idaho, in and for Boise County.

RALPH COWDEN,

Plaintiff,

vs.

J. C. MILLS, JR., Sheriff of Boise County, Idaho,

Defendant.

Complaint.

Comes, now, the plaintiff herein and for cause of action against the defendant alleges:

I.

That the defendant, J. C. Mills, Jr., now is and during all the times herein mentioned has been the duly elected, qualified and acting sheriff of the County of Boise, State of Idaho.

II.

That on the first day of July, 1902, in the county of Boise, State of Idaho, the plaintiff was the owner and in

possession and entitled to the possession and ever since said time has been and now is the owner and entitled to the possession of the following described chattels of the value of twenty-one thousand eight hundred and sixty-six and 50-100 (21,866.50) dollars, to wit: twenty-six hundred and twenty-nine head of ewes, branded $\overset{\frown}{\text{G}}$ with black paint; also sixteen hundred and forty-five lambs branded $\overset{\frown}{\text{G}}$ with black paint; also twenty hundred and eighty-eight head of mixed yearlings branded $\overset{\frown}{\text{G}}$ with black paint, also branded H with red paint. Said sheep being known as the Cowden sheep.

III.

That defendant as sheriff of said county on the 1st day of August, 1902, in the county of Boise, State of Idaho, and at a time when the plaintiff was the owner and in possession and entitled to the possession of said property and all thereof and without the plaintiff's consent wrongfully took said goods and chattels from the possession of the plaintiff into the possession of the defendant.

IV.

That before the commencement of this action, to wit, on the —— day of August, 1902, before the filing of this complaint, the plaintiff demanded the possession of said goods and chattels.

V.

That said defendant still unlawfully and without right withholds and denies said goods and chattels and all of the same from the possession of the plaintiff to his damage in the sum of twenty-one thousand eight hundred and

sixty-six and 50-100 (21,866.50) dollars, the value of the sheep and five thousand (5,000) dollars damages for the detention of the same.

Wherefore plaintiff prays judgment against the defendant:

First. For the recovery of possession of said goods and chattels or for the sum of twenty-one thousand eight hundred and sixty-six and 50-100 (21,866.50) dollars, the value thereof in case return cannot be had.

Second. For five thousand dollars damages and for costs of this suit.

W. E. BORAH and
FRANK J. SMITH,
Attorneys for Plaintiff.

State of Idaho,
County of Canyon,—ss.

Ralph Cowden, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the above and foregoing complaint and knows the contents thereof and that the same is true of his own knowledge.

RALPH COWDEN.

Subscribed and sworn to before me this 6th day of August, 1902.

FRANK J. SMITH,
Notary Public.

[Endorsed]: In the District Court of the Third Judicial District, State of Idaho, County of Canyon. Ralph

Cowden vs. J. C. Mills, Jr., Sheriff Boise County, Idaho. Complaint. Filed August 9th at 40 minutes past 10 o'clock, A. M. 1902. Joseph Penrod, Clerk District Court. W. E. Borah and Frank J. Smith, Attorneys for Plaintiff.

In the District Court of the Third Judicial District of Idaho, in and for Boise County.

RALPH COWDEN,

Plaintiff,

vs.

J. C. MILLS, JR., Sheriff Boise County, Idaho,

Defendant.

Demurrer.

Comes now the defendant and demurs to the complaint of the plaintiff herein, upon the grounds that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, defendant prays to be hence dismissed with his costs in this behalf expended.

HAWLEY & PUCKETT,
Attorneys for Defendant.

Service of copy of above and foregoing demurrer admitted this 21st day of August, 1902.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: District Court, Third Judicial District,

County of Ada, State of Idaho. Ralph Cowden vs. J. C. Mills, Jr., Sheriff. Demurrer. Filed Dec. 20, 1902. J. H. Wickersham, Clerk. Filed August 22, 1902. Jos. Penrod, Clerk Dist. Court. Filed Feb. 18th, 1903. John A. Tucker, Clerk.

In the District Court of the Third Judicial District of Idaho, in and for Boise County.

RALPH COWDEN,

Plaintiff,

vs.

J. C. MILLS, JR., as Sheriff of Boise County, Idaho,

Defendant.

Answer.

Comes now the above-named defendant, and by way of answer to the complaint of plaintiff filed herein, admits, denies and alleges as follows:

1st. Admits that the defendant now is, and during all the times mentioned in plaintiff's complaint has been the duly qualified and acting Sheriff of Boise County, Idaho.

2d. Denies that on the 1st day of July, 1902, or at any other time, either in the county of Boise in the State of Idaho, or elsewhere the said plaintiff was the owner in the possession, or entitled to the possession, or ever at any time since such day has been, or now is the owner, or entitled to the possession of the property and chattels mentioned in plaintiff's complaint, to wit, 2,629 head of ewes branded quarter circle G with black paint, and 2,069 head

of mixed yearlings branded quarter circle G with black paint and with red paint, or any part thereof, of the value of $21,866.50 or the value of any other sum or amount, or at all.

3d. Denies that said defendant as sheriff, or otherwise, on the 1st day of August, 1902, or at any other time in the county of Boise, State of Idaho, or elsewhere at any time since, plaintiff was the owner or in the possession or entitled to the possession of said sheep or property, or all or any part thereof, without the plaintiff's consent wrongfully took said property or chattels, or any part thereof, from the possession of the plaintiff, or into the possession of this defendant, or otherwise.

4th. Denies that before the commencement of this action and on the —— day of August, 1902, or at any other time, or before the filing of this complaint, the plaintiff demanded posssesion of said property or chattels, or any part thereof.

5th. Denies that this defendant still, or otherwise, or unlawfully or without right, withholds or detains said property or chattels, or all or any part of the same from the possession of the plaintiff to his damage in the sum of $21,866.50, or any other sum, either as the value of said sheep or otherwise, and denies that the said plaintiff has been damaged in the sum of $21,866.50, or any other sum or amount as damages or otherwise, for the detention or any detention of said sheep, or any part thereof.

And for a further defense herein, the defendant alleges:

1st. That from and after the 30th day of November,

1901, the Flato Commission Company, a corporation, has been and now is the owner and holder of a certain chattel mortgage covering and including the property described in plaintiff's complaint herein, given by one R. L. Shaw to secure the payment to the said The Flato Commission Company, aforesaid, of the sum of $18,626.55, together with the interest thereon as provided in said mortgage, which said sum has never been paid or any part thereof, and which said chattel mortgage was duly filed with the Recorder of Boise County, Idaho, on the 31st day of July, 1902, in Book 2 of Chattel Mortgages, at page 240, and which said chattel mortgage has never been paid, cancelled or satisfied, and is now and all the times since its execution, has been in full force and effect.

2. That on the —— day of September, 1902, proceedings were commenced to foreclose such chattel mortgage under the provisions of Sections 3391 to 3398, inclusive, of Title XII of Chapter IV of the Revised Statutes of Idaho, and the amendments thereto.

3d. That pursuant to the provisions of such Statutes one George A. Hawkes who then was, and now is the agent of the said The Flato Commisison Company aforesaid, the said mortgagee made an affidavit stating the date of said mortgage, the names of the parties thereto, and a full description of the property mortgaged and the amount due thereon, together with a notice signed by said George A. Hawkes, agent of the mortgagee, requiring the said defendant as Sheriff of Boise County, to take the said property into the possession of the defendant and sell

the same, which said affidavit and notice were placed in the hands of said defendant as such sheriff.

4th. That said defendant as such sheriff, by virtue of such process and not otherwise, on the 1st day of August, 1902, duly levied upon and took into his possession the sheep mentioned in said complaint, the same being at the time of such levy in the possession of L. E. Hodson; and said defendant did on the 2d day of August, 1902, deliver to said L. E. Hodson, personally, a true copy of said affidavit, together with a notice signed by said Hawkes, setting forth a full description of said property, the amount claimed by virtue of said mortgage, and the time and place of selling said property.

5th. That said defendant as such officer, made due return of such affidavit, and all proceedings thereunder, and transferred the same to the clerk of said Court, in whose office the same is now on file; and thereafter in accordance with the provisions of the Revised Statutes of Idaho above stated, advertised said property mentioned in said complaint for sale at public auction, and on the 12th day of August, 1902, in pursuance of such affidavit and notice sold said property to the Flato Commission Company, who was the highest and best bidder therefor at such sale for the sum of $14,233.50, and thereafter, in accordance with said provisions, issued and delivered to said The Flato Commission Company his certificate of sale therefor, and credited the amount bid therefor by the said The Flato Commission Company on said mortgage.

Wherefore, this defendant demands judgment against said plaintiff,

1st. That plaintiff take nothing by his complaint herein;

2nd. That defendant have judgment for his costs and disbursements in this behalf expended.

HAWLEY & PUCKETT,
Attorneys for Defendant.

State of Idaho,
County of Ada,—ss.

James H. Hawley, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action, and in that capacity makes this affidavit; that he has read the above and foregoing answer and knows the contents thereof and that the same is true of his own knowledge; that the reason this affidavit is made by affiant instead of the defendant in person is, that the defendant is absent from this Ada County, the residence of this affiant and his said attorney.

JAMES H. HAWLEY.

Subscribed and sworn to before me this 7th day of January, 1903.

[Seal] G. G. ADAMS,
Notary Public.

Service of the above answer by copy admitted this 13th day of Jan., 1903.

W. E. BORAH,
Attorney for Plaintiff.

[Endorsed]: In the District Court of the Third Judicial District of Idaho, in and for Boise County. Ralph Cowden vs. J. C. Mills, Jr., as Sheriff of Boise County, Idaho. Answer. Filed Jany. 13, 1903. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy. Filed Feby. 18th, 1903. John A. Tucker, Clerk.

In the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County.

RALPH COWDEN,

Plaintiff,

vs.

J. C. MILLS, JR., Sheriff,

Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 2d day of April, 1903, before the Court, without a jury—a jury having been duly waived by the parties, and Frank Smith and W. E. Borah appearing as attorneys for the plaintiff and Hawley and Puckett and James H. Van Dusen appearing as attorneys for the defendant, and from the facts introduced the court finds the facts as follows, to wit:

1. That the defendant, J. C. Mills, Jr., during all the times mentioned in the complaint was the duly elected, qualified and acting sheriff of the County of Boise, State of Idaho.

2. That on August 1, 1902, and at all times mentioned in the complaint the plaintiff was the owner and entitled

to the possession of certain sheep in number 6,342; that upon said date the defendant wrongfully and without the consent of the plaintiff took said sheep from the plaintiff's possession; that the value of said property at the time of taking was $18,091.30; that demand was duly made for the return of said property prior to the filing of the complaint in the above action, that such return was refused and that the sheep were afterwards sold by the defendant at public sale.

3. That the defendant in taking possession of said sheep was acting under and by virtue of a certain chattel mortgage dated November 30th, 1901, executed by R. L. Shaw individually to the Flato Commission Company and purporting to cover 3,500 head of yearling wethers, 3,500 head of ewes, 3,500 head of mixed lambs and wool, described in said mortgage as being located about twelve or fifteen miles south of Boise City, Ada County, Idaho; that at the time of the execution of said mortgage the said sheep in question in this suit were in Canyon County, Idaho, and were then located there; that said mortgage was never filed or recorded in Canyon County, and was not filed or recorded in Boise County until August ——, 1902.

4. That said mortgage was not verified, was executed by R. L. Shaw individually and did not upon its face purport to cover other than individual property.

5. That the sheep taken possession of by the defendant were sheep formerly belonging to Cowden and Gowan and in which said Shaw at no time had any interest; that

said Cowden purchased Gowan's interest in said sheep June 10, 1902.

6. That at the time of the purchase of said sheep by Cowden from Gowan the said plaintiff had no actual knowledge of the existence of said mortgage above referred to, and that the same was not upon record either in Canyon County or Boise County at the time of said purchase; that said mortgage did not cover any of the sheep taken possession of by the defendant in this suit; that at the time of the purchase by Cowden from Gowan of his interest the said sheep were in Boise County, Idaho.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts the Court finds that said mortgage is void as to this plaintiff and was never a lien upon the property taken by the defendant.

Second, that the plaintiff is entitled to judgment for the return of said property, to wit: 6,342 head of sheep branded quarter circle G, black paint, or in case return cannot be had, to judgment against the defendant for the value thereof in the sum of $18,091.30, and with interest thereon at the rate of seven per cent per annum from August 1, 1902, amounting to $1,104.57, total, principal and interest $19,195.87 and for costs of suit, and it is ordered that judgment be entered accordingly.

GEO. H. STEWART,
Judge.

Dated June 17th, 1903.

[Endorsed]: District Court, Third Judicial District, State of Idaho, County of Canyon. Ralph Cowden, Plaint-

iff, vs. J. C. Mills, Jr., Sheriff, Defendant. Findings. Filed June 20th, 1903. John A. Tucker, Clerk. W. E. Borah and Frank J. Smith, Attys. for Plaintiff.

In the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County.

RALPH COWDEN,

Plaintiff,

vs.

J. C. MILLS, JR., Sheriff,

Defendant.

Judgment by the Court.

This cause came on regularly for trial on the 2d day of Apr., 1903, Frank Smith and W. E. Borah appearing as counsel for plaintiff and Hawley and Puckett and James H. Van Dusen for the defendant. A trial by jury having been expressly waived by the respective parties the cause was tried before the Court without a jury, whereupon witnesses upon the part of the plaintiff and defendant were duly sworn and examined and documentary evidence introduced by the respective parties, and the evidence being closed the cause was submitted to the Court for consideration and decision, and after due deliberation thereon the Court files its findings and decision in writing and orders that judgment be entered herein in favor of the plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that Ralph Cowden, the plaintiff, is entitled to recover the possession and

return of the property in question, to wit, 6,342 head of sheep branded quarter circle G, black paint, or in case return cannot be had it is ordered, adjudged and decreed that said plaintiff Cowden have judgment against the defendant, J. C. Mills, Jr., Sheriff, for the value of said property in the sum of $18,091.30, with interest thereon at the rate of seven per cent per annum from August 1, 1902, amounting to $1,104.57, total, principal and interest, $19,-195.87, and for costs of suit and disbursements incurred in this action amounting to the sum of $145.14.

Dated June 17, 1903.

GEO. H. STEWART,

Judge.

[Endorsed]: District Court, Third Judicial District, County of Canyon, State of Idaho. R. A. Cowden, Plaintiff, vs. J. C. Mills, Jr., Sheriff of Boise County, Defendant. Judgment. Filed June 20, 1903. John A. Tucker, Clerk. W. E. Borah and Frank Smith, Attorneys for Plaintiff.

[Endorsed]: In the District Court, Third Judicial District, County of Canyon, State of Idaho. Judgment-Roll. Ralph Cowden, Plaintiff, vs. J. C. Mills, Jr., Sheriff of Boise County, Idaho, Defendant. Filed June 20, 1903. John A. Tucker, Clerk. Plaintiff's Exhibit "C." Filed June 3, 1905.

———

Plaintiff's Exhibit "E."

Boise, Idaho, July 26th, 1902.

J. C. Mills, Sheriff Boise County, Idaho City, Idaho.

Dear Sir: We send you bond for twenty thousand dol-

lars in the usual form, and the statutory affidavit and notice, in a foreclosure of chattel mortgage against certain sheep, in favor of the Flato Commission Company. Please attend to this matter at once. Mr. Bree, an agent of the company, will meet you at Lardo, and give you full instructions. You understand the Statutory method without doubt, and therefore we do not think it necessary to explain the matter to you. We hope you can get started on Monday, as time is precious in this matter.

Enclosures.

Yours very truly,

HAWLEY & PUCKETT.

No. 249. Plaintiff's Exhibit "E." Filed June 3d, 1905.

Plaintiff's Exhibit "F."

Copy.

To J. C. Mills, Sheriff of Boise County, Idaho.

You are hereby required to take into your possession the mortgaged property described in the annexed affidavit, and to sell the same according to law.

THE FLATO COMMISSION COMPANY,
By ED. H. REED,
Director, Agent and Representative.

HAWLEY & PUCKETT,
Attorneys for Plaintiff, the Flato Commission Company.

Plaintiff's Exhibit "F." Filed June 3, 1905.

Plaintiff's Exhibit "G."

INDEMNITY BOND OF FORECLOSURE OF CHATTEL MORTGAGE.

Know all men by these presents, that we, the Flato Commission Company of Omaha, Nebraska, as principal, and The American Bonding and Trust Company of Baltimore, Md., as surety, are each held and firmly bound, unto J. C. Mills, Sheriff of Boise County, Idaho, in the sum of ($20,000.00) twenty thousand dollars, lawful money of the United States. To be paid to J. C. Mills, Sheriff, or his certain Attorney, executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th of July, 1902.

Whereas, under and by virtue of an affidavit on the foreclosure of a chattel mortgage given by one R. L. Shaw to the above-named Flato Commission Company, and the notice required by the statutes of Idaho for the foreclosure of chattel mortgages, directed and delivered to the said J. C. Mills, sheriff of Boise County, the said sheriff was directed to take into his possession the said mortgaged property and to sell the same, and the said sheriff did thereupon take into his possession the following described property, to wit:

Between six and seven thousand sheep branded with G (quarter circle G),

And whereas, upon the taking of said sheep, other persons or person claimed the said property as their own, and

Whereas, the said Flato Commission Company, notwithstanding such claim, requires that the said J. C. Mills, sheriff, that he shall retain said property in his possession and sell the same.

Now therefore, the conditions of this obligation is such that if the said Flato Commission Company of Omaha, and the American Bonding and Trust Company of Baltimore City, Md., sureties, their heirs, executors, administrators or successors, or either of them, shall well and truly indemnify and save harmless the said J. C. Mills, sheriff, his heirs, executors and administrators, of and from all damage, expense, costs and charges, and against all loss and liability which he, the said sheriff, his heirs, executors or administrators shall sustain, or in any wise be put to for or by reason of the taking into his possession, retention and sale of said property, claimed as aforesaid, then the above obligation to be void, otherwise to remain in full force and virtue.

THE FLATO COMMISSION COMPANY,
By ED. H. REID,
Director, Agent, and Representative.
Principal.

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,
By H. E. NEAL,
Vice-President.

[Seal] Attest: CHARLES F. NEAL,
Asst. Secty.

Plaintiff's Exhibit "G." Filed June 3, 1905.

Plaintiff's Exhibit "H."

Idaho City, Idaho, August 29, 1902.

Mr. Charles F. Neal, Agent for the American Bonding and Trust Co.

Dear Sir: You are herby notified that suit has been brought against me as sheriff of Boise County, Idaho, to recover the sum of $21,866.50, together with $5,000.00 damages for selling the sheep mentioned in the foreclosure of a certain chattel mortgage, wherein The Flato Commission Company is plaintiff and R. L. Shaw is defendant, and to which your company have agreed to indemnify me as Sheriff in the sum of $26,000.00.

Very respectfully,

J. C. MILLS.

Plaintiff's Exhibit "H." Filed June 3, 1905.

Plaintiff's Exhibit "I."

In the Supreme Court of the State of Idaho.

December Term, A. D. 1903.

RALPH COWDEN, Sheriff,
Plaintiff and Respondent,

vs.

J. C. MILLS, JR., Sheriff,
Defendant and Appellant.

On an Appeal from the District Court of the Third Judicial District in and for Canyon County.

Judgment.

This cause having been heretofore heard, submitted and taken under advisement by the Court, and the Court having fully considered the same, now on this day the cause was again called, and the decision of the Court is delivered by Justice Ailshie to the effect that the judgment and the order denying a new trial by the Court below be affirmed.

It is therefore considered, adjudged and decreed by the Court that the judgment and the order refusing a new trial of the District Court of the Third Judicial District in and for the County of Canyon, in the above-entitled cause, be and the same hereby is affirmed, costs are awarded to the respondent.

I, Sol. Hasbrouck, Clerk of the Supreme Court of the State of Idaho, do herby certify that the foregoing is a true copy of the original judgment entered in the above-entitled cause, on the 13th day of February, A. D. 1904, and now remaining of record in my office.

Witness my hand and seal of the Court affixed at my office this 13th day of Feb., 1904.

[Seal] SOL. HASBROUCK,
Clerk.

Plaintiff's Exhibit "I." Filed June 3, 1905.

Plaintiff's Exhibit "J."

Denver, Colo, 9-6-1902.

Mr. Chas. F. Neal, Agent, Boise, Idaho.

Dear Sir: I have yours of the 3d instant in the matter

of bond furnished to the Flato Commission Company, together with letter written by J. C. Mills, advising you that suit has been brought against him in the sum of about $27,000 on account of the sale of certain sheep mentioned in the collateral mortgage.

For our files, have Hawley & Puckett advise us in writing that they are looking after the interests of the sheriff on behalf of the Flato Commission Company. Inasmuch as the Flato Commission Company have a very high financial rating, I assume there will be no actual liability against this company.

Very truly yours,

RALPH W. SMITH,
V. P. and Gen'l Att'y.

Dictated S.—H.

Plaintiff's Exhibit "J." Filed June 3d, 1905.

———

Plaintiff's Exhibit "K."

Sept. 3, 1902.

No. 315.

R. W. Smith, Esqr., Denver, Colorado.

Dear Sir: In matter of bond furnished Flato Commission Co. indemnifying J. C. Mills, sheriff of Boise County, herewith I hand you notice of the sheriff to the effect that defendants have brought suit against him. Can say Messrs. Hawley & Puckett, Attorneys for the Flato Com-

mission Company, are looking after the interests of the sheriff. I herewith hand you the notice.

Very truly yours,

————————,

General Agent.

Plaintiff's Exhibit "K." Filed June 3, 1905.

————

Plaintiff's Exhibit "L."

Denver, Colorado, April 18, 1904.

W. E. Borah, Esqr., Boise, Idaho.

Dear Sir:

Re Flato Commission Company.

I have your letter of April 14th and I cannot see from the investigation I have made concerning these cases that we are liable under the obligations which were executed, one on the 26th of July, 1902, the other on the 22d of July, 1902. I am investigating the law in relation to the issues involved but will not indicate at this time that I can give you a definite answer for several days. From such examination as I have made I believe that this company is not liable upon the bonds of indemnity mentioned. However, I am writing you at this time so that you can take such action as you feel proper in the premises.

Very truly yours,,

RALPH W. SMITH,
Vice-Pres't and Gen'l Atty.

Plaintiff's Exhibit "L." Filed June 3, 1905.

Transcript of Judgment.

JUDGMENT DOCKET, DISTRICT COURT, CANYON COUNTY,

JUDGMENT DEBTOR.

J. C. Mills, Jr., Sheriff
Boise County, Idaho.

JUDGMENT CREDITOR.

Ralph Cowden.

TIME OF ENTRY,

June 20, 1903, book 2, page 120.

Judgment, amount.....	$19,195.87
Costs.....	145.15
Supreme Court Costs.....	77.05

Appeal taken Oct. 28, 1903.

Remittitur filed March 8th, 1904. Judgment and order denying a new trial by the District Court affirmed, costs awarded to respondent.

RALPH COWDEN,

Plaintiff,

vs.

J. C. MILLS, JR., Sheriff Boise County, Idaho,

Defendant.

Office of the Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for Canyon County,—ss.

I, Clerk of said Court, do hereby certify that the above and foregoing is a full, true and correct transcript of the

original judgment docket in the above-entitled action of said District Court in and for Canyon County, State of Idaho.

Attest my hand and the seal of said court this 19th day of December, 1905.

[Seal] JOHN A. TUCKER,
Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

J. C. MILLS, Late Sheriff of Boise County
Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,
Defendants.

Findings and Decision of Court.

This cause came on regularly for trial upon the 3d day of June, 1905, at a regular term of the above-named Court. A jury having been expressly waived in writing and entered upon the minutes of the Court, the case was tried before the Court without a jury, F. J. Smith, H. L. Fisher

and W. E. Borah appearing as attorneys for plaintiff, and Morrison & Pence and Neal & Kinyon appearing as attorneys for the defendants, and from the evidence introduced the Court finds the facts as follows, to wit:

1. That upon the 26th day of July, 1902, the defendant, The Flato Commission Company, made an affidavit for the foreclosure of a chattel mortgage upon certain sheep described in said affidavit and delivered said affidavit together with a proper order and notice to foreclose said chattel mortgage as required by the statutes of the State of Idaho, to J. C. Mills, sheriff of Boise County, Idaho.

2. That at the time of delivering said affidavit of foreclosure and notice as aforesaid, the Flato Commission Company as principal and the other defendant herein, the American Bonding Company of Baltimore, as surety, made, executed and delivered to said plaintiff, then sheriff of Boise County, Idaho, a certain bond of indemnity, a copy of which is attached to the complaint herein and which bond of indemnity is introduced in evidence herein as Plaintiff's Exhibit "G."

3. That said sheriff in company with one Bree, the agent of the Flato Commission Company, took possession of certain sheep under and by virtue of said chattel mortgage, advertised the same for sale and the same were sold to the defendant herein, the Flato Commission Company, all of which more fully appears by the sheriff's return in said foreclosure proceedings as shown by exhibit "D," introduced in evidence herein.

4. That one Ralph Cowden made claim to be the owner of the sheep taken into possession of said sheriff under and by virtue of said foreclosure proceedings and sold as aforesaid, and thereafter on the 9th day of August, 1902, commenced an action in the District Court of the Third Judicial District of the State of Idaho in and for Boise County against the plaintiff herein, J. C. Mills, for the recovery of the possession of said sheep or the value thereof. The said action was removed to Canyon County, Idaho, for trial, and that trial was thereafter had and such proceedings as resulted in a judgment in favor of the plaintiff therein, one Ralph Cowden against J. C. Mills, Late Sheriff of Boise County, the above named plaintiff, for the sum of $19,195.87, principal and interest, and for $145.15, costs, said judgment bearing date June 17, 1903, all of which proceedings are more fully set forth and disclosed by the judgment roll introduced in evidence herein as exhibit "C."

5. That upon the filing of said suit aforesaid, the plaintiff herein, J. C. Mills, gave notice to the defendant herein, the American Bonding Company of Baltimore, of the commencement of said suit as shown by Plaintiff's Exhibit "H," introduced in evidence herein.

6. That thereafter such procedings were had in the case of Ralph Cowden vs. J. C. Mills, sheriff of Boise County, that an appeal was taken to the Supreme Court of the State of Idaho, and that thereafter such further proceedings were had as are more particularly shown by

the remittitur in said cause which is introduced in evidence herein as Plaintiff's Exhibit "I."

7. That counsel who appeared for the sheriff in the case above named, Ralph Cowden vs. J. C. Mills, sheriff, were not employed by the said J. C. Mills, but that the counsel of the defendant, the Flato Commission Company, as such, had charge of the defense in said cause and of the appeal in said cause.

8. That the sheep which were taken possession of by said J. C. Mills and sold under foreclosure proceedings as aforesaid was the same property which was involved in the litigation and for which Ralph Cowden secured judgment against said J. C. Mills as aforesaid.

9. That no part of said judgment in the case of Ralph Cowden vs. J. C. Mills, sheriff as aforesaid, has been paid or satisfied, and that the same now stands as a judgment against said J. C. Mills, sheriff.

10. That the name by which said bond was signed, to wit, The American Bonding and Trust Company of Baltimore City, is the same company or corporation as the American Bonding Company of Baltimore, said name having been changed as shown by its articles of incorporation on file with the secretary of State of the State of Idaho by act of the legislature from the name of the American Bonding and Trust Company of Baltimore City to the American Bonding Company of Baltimore.

11. That the amount now due upon the judgment in the case of Ralph Cowden vs. J. C. Mills aforesaid, and

for which said J. C. Mills, late sheriff of Boise County, is liable is $21,976.21.

As a conclusion of Law from the foregoing facts the Court finds that the plaintiff is entitled to a judgment against the defendants, and each of them, for the sum of $21,962.21, lawful money of the United States, and costs of this suit, and it is ordered that judgment be entered accordingly.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 249. U. S. Circuit Court, Central Division, District of Idaho. J. C. Mills, Jr., vs. American Bonding Co. of Baltimore, et al. Findings. Filed June 5, 1905. A. L. Richardson, Clerk.

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In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

J. C. MILLS, Late Sheriff of Boise County,
Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and THE FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,
Defendants.

Judgment by the Court.

This cause came on regularly for trial upon the 3d day of June, 1905, at a regular term of the above-named Court. A jury having been expressly waived in writing and entered upon the minutes of the Court, the cause was tried before the Court without a jury, F. J. Smith, H. J. Fisher and W. E. Borah appearing as attorneys for plaintiff, and Morrison & Pence and Neal & Kinyon attorneys for defendants.

Whereupon witnesses were duly sworn and examined and documentary evidence introduced, and the evidence being closed the cause was submitted to the Court for consideration and decision, and after due deliberation thereon the Court files its findings and decision in writing and orders that judgment be entered herein in favor of the plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff, J. C. Mills, late sheriff of Boise County, do have and recover of and from the American Bonding Company of Baltimore, a corporation, and the Flato Commission Company, a corporation, the sum of $21,976.21, with interest thereon at the rate of seven per cent per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of $50.40.

JAS. H. BEATTY,
Judge.

Done in open court.

[Endorsed]: No. 249. U. S. Circuit Court, Central Division, District of Idaho. J. C. Mills, Jr., vs. American Bonding Co. of Baltimore, et al. Judgment. Filed June 5, 1905. A. L. Richardson, Clerk.

———

In the Circuit Court of the United States for the District of Idaho, Central Division.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and the FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska.

Defendants.

Notice of Motion for New Trial.

To J. C. Mills, Jr., Late Sheriff of Boise County, Idaho, Plaintiff, and W. E. Borah and Frank J. Smith, his Attorneys of Record:

You will please take notice that defendants, The American Bonding Company of Baltimore and Flato Commission Company, and each of them, intends to move the

Court to grant a new trial of said cause, upon the following grounds, to wit:

I.

Irregularity in the proceedings of the Court, in that the Court ordered a trial in this cause and tried the same, after the adjournment of the regular March, A. D. 1905, Term of said Court and prior to the beginning of the next succeeding term of said Court.

II.

Accident and surprise which ordinary prudence could not have guarded against.

III.

Newly discovered evidence, material to the defense of this cause, which defendants nor either of them could with reasonable diligence have discovered and produced at the trial.

IV.

Excessive damages.

V.

Insufficiency of the evidence to justify the findings of fact and decision.

VI.

That such decision is against law.

VII.

Errors in law occurred at the trial and duly excepted to by the defendants and by each of them.

Said motion will be made upon affidavits, upon the records and the files in this action and upon a statement

of the case, and bill of exceptions, hereafter to be prepared and served on you and filed in this case.

MORRISON & PENCE and
NEAL & KINYON,

Attorneys for Defendants, American Bonding Company of Baltimore, and Flato Commission Company, for each of whom this notice is given.

Due service of within notice, with copy, admitted this 24th day of June, 1905.

———————,

Attorneys for Plaintiff.

State of Idaho,
County of Ada,—ss.

C. L. Lingenfelter, being first duly sworn, deposes and says:

That on Saturday, June 24th, 1905, at 3:30 P. M., he served the within notice of intention to move for a new trial, upon W. E. Borah, one of the attorneys for the above-named plaintiff, by leaving a true copy thereof with Charles McCarthy, the clerk found in charge of the office of said W. E. Borah.

CHARLES L. LINGENFELTER.

Subscribed and sworn to before me this 24th day of June, 1905.

[Seal]

B. F. NEAL,
Notary Public.

[Endorsed]: No. 249. U. S. Circuit Court, Central Division, District of Idaho. J. C. Mills, Jr., vs. American Bonding Co. et al. Notice of Motion for New Trial. Filed June 24th, 1905. A. L. Richardson, Clerk.

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In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division.

J. C. MILLS, Late Sheriff of Boise County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, etc., et al.

Defendants.

Notice.

To the Flato Commission Company (a Corporation), and to Messrs. Neal & Kinyon and Messrs. Morrison & Pence, its Attorneys:

You will please take notice that the undersigned, the American Bonding Company of Baltimore (a corporation), desires, and is about to prosecute proceedings in the above-entitled action, in the matter of a writ of error

herein, for a review by the Circuit Court of Appeals of the United States in and for the Ninth Circuit, of the proceedings heretofore had herein, and desires, and is about to do and perform each and every necessary act of things whatsoever, in and about the prosecution of such proceedings.

And you are hereby notified to appear in the matter of such proceedings, and to join therein, is you so desire.

AMERICAN BONDING COMPANY OF BALTIMORE,

By JESSE W. LILIENTHAL,
Vice-President.

Dated August 26, 1905.

Due service of the within notice by copy, is admitted this 30th day of August, 1905.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Flato Commission Company, a Corporation.

[Endorsed]: No. 249. In the Circuit Court of the United States, Ninth Circuit, for the District of Idaho, Central Division. J. C. Mills, Jr., late Sheriff of Boise County, Idaho, Plaintiff, vs. American Bonding Company of Baltimore, a Corporation, etc., et al., Defendants. Notice. Filed Sept. 8th, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division.

J. C. MILLS, Late Sheriff of Boise County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, etc., et al.,

Defendants.

Notice of Intention.

To the Flato Commission Company (a Corporation), and to Messrs. Neal & Kinyon and Messrs. Morrison & Pence, its Attorneys:

You will please take notice that the undersigned, the American Bonding Company of Baltimore (a corporation), desires, and is about to prosecute proceedings in the above-entitled action, in the matter of a writ of error herein, for a review by the Circuit Court of Appeals of the United States in and for the Ninth Circuit, of the proceedings heretofore had herein, and desires, and is about to do and perform each and every necessary act of thing whatsoever, in and about the prosecution of such proceedings.

And you are hereby notified to appear in the matter of such proceedings, and to join therein, is you so desire.

AMERICAN BONDING COMPANY OF BALTIMORE,

By JESSE W. LILIENTHAL,
Vice-President.

Dated August 26, 1905.

State of Nebraska,
County of Douglas,—ss.

Joseph R. Wells, of lawful age, being duly sworn, makes oath and says that he served the within notice upon the Flato Commission Company, by delivering a true copy thereof to its Secretary, James C. Dahlman, in South Omaha, Nebraska, on the 2d day of October, 1905.

JOSEPH R. WELLS.

Subscribed in my presence and sworn to before me this 2d day of October, 1905.

[Seal] GEORGE L. WHITMORE,
Notary Public.

Due serivce of the within notice by copy, is admitted this 2d day of October, 1905.

————————,
Secretary of Flato Commission Co.

[Endorsed]: No. 249. In the Circuit Court of the United States, Ninth Circuit, for the District of Idaho, Central Division. J. C. Mills, Jr., late Sheriff of Boise County, Idaho, Plaintiff, vs. American Bonding Company of Baltimore, a Corporation, etc., et al., Defendants. No-

tice of Intention, etc. Filed Oct. 14th, 1905. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Central Division.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,

Plaintiff,

vs.

THE AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, et al.,

Defendants.

Objections to Proposed Bill of Exceptions.

Comes now the plaintiff and objects to the settlement or allowance of the porposed bill of exceptions heretofore filed in the above-entitled cause, and for grounds of said objection says:

1st.

Said bill of exceptions was not presented, served or filed during the term of the Court at which the said action was tried and the judgment entered.

2d.

That said bill of Exceptions was not served or filed within any time prescribed by law, or by the order of this court, or by any stipulation or agreement between counsel.

3d.

That said bill of exceptions was not served and filed until more than three months after the adjournment of the term

of court sine die, at which said cause was tried and judgment entered, and for more than three months after the time extended for making and filing said bill of exceptions.

4th.

That said bill of exceptions was not filed and served until after the appeal in this case was taken, and until after six months had elapsed from the entry of judgment in the above cause.

W. E. BORAH,
Attorney for Plaintiff, Boise, Idaho.

[Endorsed]: Filed Dec. 12th, 1905. A. L. Richardson, Clerk.

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In the Circuit Court of the United States, Ninth Circuit, Central Division.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,
Plaintiff,

vs.

THE AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, et al.,
Defendants.

Affidavit in Support of Objections to Proposed Bill of Exceptions.

State of Idaho,
County of Ada,—ss.

W. E. Borah, being duly sworn, deposes and says: That

he is and has been from the commencement of the litigation, one of the attorneys for the above-named plaintiff, and as such attorney is familiar with the facts herein stated, and has also taken the precaution to review the record as to dates before making this affidavit. Affiant states that the judgment in the aboveentitled cause was signed, made and entered of record June 5, 1905; that the defendant has taken a stipulation for sixty days, in which to serve and file a bill of exceptions, but that no order of the Court was ever made upon said stipulation; that said stipulation provided that the sixty days should run from notice of entry of judgment; that notice was given of the entry of said judgment to the attorneys for defendants June, 5, 1905; that upon June 24, 1905, after entry of said judgment, defendants' attorneys served notice in writing of a motion for new trial; that on June 15th, 1905, attorneys for plaintiff served written notice for settlement of the cost bill; that thereafter the above stipulation referred to with reference to serving and filing a bill of exceptions, was extended by stipulation until August 19, 1905, but that no order was ever made at any time by the court; that the time for serving and filing a bill of exceptions was never extended, by stipulation or otherwise, in any manner at all, after the 19th day of August, 1905, and that the time for defendants to serve and file a bill of exceptions expired August 19th, 1905; that the term of Court at which the judgment in the aboveentitled cause was rendered, adjourned sine die August 17, 1905; that upon December 2, 1905, the defendants filed

a petition for a writ of error, the assignments of error, the order allowing appeal and the bond on appeal; that on December 4, 1905, they filed a purported bill of exceptions with the clerk of the Court; that no service of said bill of exceptions upon counsel for plaintiff was made until December 11, 1905; that said purported bill of exceptions was filed and served more than three months after the adjournment of the above term of court sine die, and after the time for filing the same as extended by the stipulation aforesaid, and that the same was filed without any authority from the Court, or without any stipulation, or order permitting or allowing the same.

And further affiant saieth not.

W. E. BORAH.

Subscribed and sworn to before me this 12th day of December, 1905.

[Seal] JOHN J. BLAKE,
Notary Public.

[Endorsed]: Filed Dec. 12, 1905. A. L. Richardson, Clerk.

At a Stated Term of the Circuit Court of the United States, for the District of Idaho, Held at Boise, Idaho, on Monday, the 18th day of Dec., 1905. Present: Hon. JAS. H. BEATTY, Judge.

J. C. MILLS, Late Sheriff of Boise County, Idaho,
Plaintiff,
vs. No. 249.
AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation.

Order Refusing to Settle Bill of Exceptions.

On this day was announced the decision of the Court upon the plaintiff's objections to the settlement of defendants' proposed bill of exceptions herein, heretofore argued and submitted, ordered that said objections be and the same are hereby sustained. To which ruling the defendant American Bonding Company, excepted in due form of law.

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In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,

Plaintiff,

vs. No. 249.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation, Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Petition for Writ of Error.

Now comes the American Bonding Company of Baltimore, one of the defendants herein, and says that on the

5th day of June, 1905, judgment was entered herein in favor of plaintiff and against this defendant, for the sum of twenty-one thousand nine hundred and seventy-six and 21-100 dollars, and costs of action, and that in the said judgment and the proceedings had prior thereto, in this cause, certain errors were committted to the prejudice of this defendant, all of which will appear in detail from the assignment of errors herein.

Wherefore said defendant prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that the transcript of the records and the papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

And your petitioner will ever pray.

Dated 2d of December, 1905.

NEAL & KINYON,
MORRISON & PENCE,
JESSE W. LILIENTHAL,
Attorneys for said Defendant.

[Endorsed]: No. 249. In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Cen-

tral Division. J. C. Mills, Jr., Late Sheriff of Boise County, Idaho, Plaintiff, vs. American Bonding Company, of Baltimore, et al., Defendants. Petition for Writ of Error. Filed Dec. 2d, 1905. A. L. Richardson, Clerk. Neal & Kinyon, Morrison & Pence and Jesse W. Lilienthal, Attorneys for Defendant, American Bonding Co.

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In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and the FLATO COMMISSION COMPANY, a Corporation, Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Assignment of Errors.

The defendant, the American Bonding Company of Baltimore, in this action, in connection with its petition for a writ of error herein, makes the following assignments of error which it avers occurred:

I.

The Court erred as to said defendant, in overruling the

demurrer of said defendant to plaintiff's complaint herein.

II.

The Court erred as to said defendant, in ordering judgment to be entered in favor of the plaintiff and against said defendant for the sum of twenty-one thousand nine hundred and seventy-six and 21-100 dollars and the costs of this action, and in ordering judgment in any amount whatever, against said defendant.

III.

The Court erred as to said defendant, in entering judgment in favor of the plaintiff herein, against said defendant.

IV.

The Court erred as to said defendant, in overruling the objection by said defendant to the admission of any evidence herein, upon the ground that the complaint herein does not state facts sufficient to constitute a cause of action against this defendant.

V.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the judgment-roll offered in evidence during the examination of the witness Tucker, the full substance whereof is as follows: Said judgment-roll consists of the proceedings in the District Court of the Third Judicial District of the State of Idaho, in and for Boise County, in an action wherein Ralph Cowden was plaintiff and J C. Mills, Jr., as Sheriff of Boise County, Idaho, was defendant, and consists

(1) Of complaint praying for the possession of certain sheep alleged to have been converted by said defendant as such sheriff, or for the value thereof, and for damages and costs;

(2) Of demurrer to such complaint;

(3) Of answer to such complaint, wherein defendant justified the taking of said property and the sale thereof under and by virtue of certain proceedings for the foreclosure of a chattel mortgage embracing said property, given by one R. L. Shaw to secure the payment to the Flato Commission Company of the sum therein mentioned, together with interset and costs.

That said proceedings were commenced under the provisions of Secs. 3391 to 3398 inclusive, of Title 12, Chap. 4 of the Revised Statutes of Idaho, and are based on an affidavit and notice given by George A. Hawkes as the Agent of said Flato Commission Company.

That said property was in said proceedings sold to said Commission Company for $14,233.50.

(4) Of findings of fact and conclusions of law in said action.

(5) Of judgment by said Court in favor of plaintiff, and against defendant for the possession of the property therein referred to, or in case return could not be had, then for judgment for the sum of $18,091.30, together with $1,104.57 interest and $145.15 costs.

VI.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence

of the entry from the judgment docket during the examination of the witness Tucker, the full substance whereof is as follows:

"Judgment Debtor, J. C. Mills, Jr., Sheriff Boise County, Idaho. Judgment Creditor, Ralph Cowden. Amount, $19,195.87. Costs, $145.15. Time of entry, June 20, 1903. Page of Judgment Book, book 2, page 120."

VII.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the papers marked Plaintiff's Exhibit "D," offered in evidence during the examination of the witness J. C. Mills, Jr., whereof the full substance is as follows:

(1) An affidavit by George W. Hawkes, as the agent and representative of the Flato Commission Company, to the effect that on November 30, 1901, at South Omaha, Nebraska, one R. L. Shaw made and delivered to said corporation his promissory note for $10,000, and his further promissory note for $8,626,55, together with a certain chattel mortgage for the purpose of securing said notes, on 3,500 head of yearling wethers and wool, 3,500 head of ewes, their increase and wool, 3,000 head of mixed lambs and wool, describing, with the marks thereon, and further stating that the date of maturity of each of said notes is past, that no portion of the principal or interest has been paid, and that there is due to said corporation from said Shaw on said notes and mortgages, the sum of $18,626.55, with interest.

(2) The return of said Mills as sheriff, of said affi-

davit of foreclosure, wherein he states that on August 1, 1902, he took into his possession certain of the property described in said affidavit, and on August 12, 1902, sold certain of said property to the Flato Commission Company for the sum of $14,233.50, whereof after deducting commissions, the remainder, $13,871.59, was paid by him to said company.

VIII.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "E," offered in evidence during the examination of the witness J. C. Mills, Jr., whereof the full substance is as follows:

A letter from Hawley & Puckett, attorneys, to J. C. Mills, Sheriff Boise County, dated July 26th, 1902, enclosing bond for $20,000 sued on herein, and statutory affidavit and notice in a foreclosure of chattel mortgage against certain sheep in favor of the Flato Commission Company, and requesting that the matter be attended to at once; said affidavit and notice being those referred to under Assignments Nos. V and VII hereinbefore stated.

IX.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "F," offered in evidence during the examination of the witness J. C. Mills, Jr., the full substance whereof is, a notice to said Mills as sheriff of Boise County, from the Flato Commission Company, by its agent, directing him to take into

his possession the mortgaged property described in the affidavit already referred to, and to sell the same according to law.

X.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "G," offered in evidence during the examination of the witness J. C. Mills, Jr., which in full substance was, an indemnity bond by said Flato Commission Company as principal, and the American Bonding and Trust Company of Baltimore, Md., as surety, to said Mills as sheriff of Boise County, Idaho, in the sum of $20,000.00, dated July 26th, 1902, reciting that whereas by virtue of the affidavit already referred to, said sheriff was directed to take into his possession the property mortgaged by said Shaw, and to sell the same, and thereupon took into his possession certain property, and whereas upon such taking other persons or person claimed said property, and said Flato Commission Company required that said Mills, as sheriff, retain and sell the same, that said principal and surety would indemnify said Mills, such sheriff, of and from all damages, expense, costs and charges, and against all loss and liability which said sheriff should sustain by reason of his taking, retention and sale of said property, said bond being that annexed to the complaint herein as exhibit "A."

XI.

The Court erred as to said defendant, in overruling said defendant's objection to the question, "Mr. Cowden

afterwards brought suit against you?'' asked of said witness J. C. Mills, Jr.

XII.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the paper marked Plaintiff's Exhibit ''H,'' offered in evidence during the examination of the witness J. C. Mills, Jr., which in full substance was a letter by said J. C. Mills to Charles F. Neal, as agent for said American Bonding and Trust Company, dated August 29, 1902, notifying him, said Neal, that suit had been brought against said Mills, as sheriff, to recover said sum of $21,866.50, and damages for the sale of said sheep under the foreclosure already referred to.

XIII.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the remittitur from the Supreme Court during the examination of the witness J. C. Mills, Jr., which in full substance was a remittitur from the Supreme Court of the State of Idaho, announcing the affirmance of the judgment and order denying a new trial in the case of Cowden vs. Mills already referred to.

XIV.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the paper marked Plaintiff's Exhibit ''J,'' offered in evidence during the examination of the witness J. C. Mills, Jr., which in full substance was a letter from Ralph

Smith as Vice-President and General Attorney of the American Bonding and Trust Company of Baltimore City, to Charles F. Neal, Agent, Boise, Idaho, acknowledging receipt of letter written by Mills to Neal, already referred to.

XV.

The Court erred as to said defendant, in overruling said defendant's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "K," offered in evidence during the examination of the witness J. C. Mills, Jr., which in full substance was a letter from said Neal, as general agent, to R. W. Smith, Denver, Colorado, enclosing notice from Mills to Neal already referred to.

XVI.

The Court erred as to said defendant in overruling said defendant's objection to the admission in evidence of the paper marked Plaintiff's Exhibit "L," offered in evidence during the examination of the witness J. C. Mills, Jr,. which in full substance was a letter from Ralph W. Smith as Vice-President and General Attorney of the American Bonding Company of Baltimore, to W. E. Borah of Boise, Idaho, denying defendant's liability upon the indemnity bond to J. C. Mills, Jr., said bond being that annexed to the complaint herein as exhibit "A."

XVII.

The Court erred as to said defendant, in denying and overruling said defendant's motion to strike out such portions of the testimony of the witness J. C. Mills, Jr., as related to the giving of the bond in suit.

XVIII.

The Court erred as to said defendant in overruling said defendant's demurrer to the evidence.

XIX.

The Court erred as to said defendant, in sustaining plaintiff's objection to the admission in evidence of the deposition of Ed. H. Reed, the full substance whereof was to the effect that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Mills as sheriff, and that said bond was without consideration, and void.

XX.

The Court erred as to said defendant, in sustaining plaintiff's objection to the admission in evidence of the deposition of John H. Bonson, the full substance whereof was to the effect first, that at the time of the alleged sale to Ralph Cowden, plaintiff in the action hereinbefore referred to, he had full knowledge and notice of the existence of the prior mortgage by R. L. Shaw to the Flato Commission Company, of the sheep alleged to have been converted by said Mills as such sheriff, second, that the value of the sheep so alleged to have been converted was an amount smaller than that found by the District Court of the Third Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. J. C. Mills, Jr., Sheriff, etc., defendant.

plaintiff's objection to the admission in evidence of the

XXI.

The Court erred as to said defendant, in sustaining

deposition of O. W. Eaton, the full substance whereof was to the effect, first, that at the time of the alleged sale to Ralph Cowden, plaintiff in the action hereinbefore referred to, he had full knowledge and notice of the existence of the prior mortgage by R. L. Shaw to the Flato Commission Company, of the sheep alleged to have been converted by said Mills as such sheriff; second, that the value of the sheep so alleged to have been converted was an amount smaller than that found by the District Court of the Third Judicial District of the State of Idaho, in the action entitled Ralph Cowden, plaintiff, vs. J. C. Mills, Jr., Sheriff, etc., defendant.

XXII.

The Court erred as to said defendant, in sustaining plaintiff's objection to the admission in evidence of the deposition of George W. Hawkes, the full substance of which was to the effect that the bond in suit was not given voluntarily, but under duress and coercion by plaintiff Mills as sheriff, and that said bond was without consideration and void.

XXIII.

The Court erred as to said defendant, in sustaining plaintiff's objection to the admission in evidence of the deposition of James C. Dahlman as to the value of sheep therein referred to, the full substance of which said evidence so rejected was to the effect that the value of the sheep alleged to have been converted was an amount smaller than that found by the District Court of the Third Judicial District of the State of Idaho, in the action en-

titled Ralph Cowden, plaintiff, vs. J. C. Mills, Jr., Sheriff, etc., defendant, said bond being that annexed to the complaint herein as exhibit "A."

XXIV.

The Court erred as to said defendant, in sustaining plaintiff's objection to said defendant's offer to prove by the testimony of J. C. Dressler, first, that Ralph Cowden was not the owner of the sheep in controversy, and that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed; second, that whatever interest Ralph Cowden had or acquired in the sheep in controversy was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw; third, that the judgment in the case of Cowden versus Mills was excessive and does not measure the true value of the sheep for the taking of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not in excess of $6,500, and that that amount is the total amount of damages of all sorts caused in the premises, if any.

XXV.

The Court erred as to said defendant, in sustaining plaintiff's objection to said defendant's offer to prove by the testimony of Ed Paine, first, that said Ralph Cowden was not the owner of the sheep in controversy and that they were the property of R. L. Shaw, mortgagor, and were a part of those described in the mortgage sought to be foreclosed; second, that whatever interest Ralph Cow-

den had or acquired in the sheep in controversy was taken with actual knowledge that they were mortgaged to the Flato Commission Company by R. L. Shaw; third, that the judgment in the case of Cowden vs. Mills was excessive, and does not mesaure the true value of the sheep for the taking of which it was recovered at the time of said taking, and that the true value of said sheep was at said time not in excess of $6,500.00 and that amount is the total amount of damages of all sorts caused in the premises, if any

NEAL & KINYON,
MORRISON & PENCE,
JESSE W. LILIENTHAL,
Attorneys for said Defendant.

[Endorsed]: No. 249. In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division. J. C. Mills, Jr., Late Sheriff of Boise County, Idaho, Plaintiff, vs. American Bonding Company, of Baltimore, and Flato Commission Company, Defendants. Assignment of Errors. Filed Dec. 2d, 1905. A. L. Richardson, Clerk. Neal & Kinyon, Morrison & Pence and Jesse W. Lilienthal, Attorneys for Defendant, Amer. Bond. Co. of Baltimore.

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At a Stated Term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on the 2d day of December, 1905. Present: JAS. H. BEATTY, Judge.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,

Plaintiff,

vs. No. 249.

AMERICAN BONDING COMPANY OF BALTIMORE, et al.,

Defendants.

Order for Filing Bond.

The defendant, American Bonding Company of Baltimore, a corporation, having this day filed its petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which said defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having this day been duly allowed:

Now, therefore, it is ordered, that upon the said defendant, American Bonding Company of Baltimore, filing with the clerk of this court a good and sufficient bond in the sum of twenty-three thousand ($23,000.00) dollars, to the effect, that if the said American Bonding Company of Baltimore, plaintiff in error, shall prosecute the said writ of error to effect, and answer all damages and costs if it

fail to make its plea good, then the said obligation is to be void, else to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings of this Court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated Dec. 2d, 1905.

JAS. H. BEATTY,
Judge.

In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Idaho, Central Division.

At a stated term of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the District of Idaho, Central Division, held at its Courtroom in the City of Boise, State of Idaho, on the 2d day of December, One Thousand Nine Hundred and Five. Present: The Honorable J. H. BEATTY, District Judge, District of Idaho, Designated to hold and holding said Circuit Court.

AT LAW.

J. C. MILLS, JR., Late Sheriff of Boise County, Idaho,

Plaintiff,

vs. No. 249.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue

of the Laws of the State of Maryland, and FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Order Allowing Writ of Error.

Upon motion of Messrs. Neal and Kinyon, Messrs. Morrison & Pence, and Jesse W. Lilienthal, Esq., attorneys for the defendant the American Bonding Company of Baltimore, and upon filing a petition for a writ of error and an assignment of errors, it is

Ordered that a writ of error be, and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the judgment heretofore entered herein, and the other matters and things in said petition and assignment set forth, and that the amount of the bond on said writ or error be, and hereby is fixed at twenty-three thousand ($23,000.00) dollars.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 249. Order Allowing Writ of Error. Filed Dec. 2d, 1905. A. L. Richardson, Clerk.

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Bond on Writ of Error.

Know all men by these presents, That we, American Bonding Company of Baltimore, a corporation, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto J C. Mills, Jr.,

in the full and just sum of twenty-three thousand dollars, to be paid to the said J. C. Mills, Jr., his certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this second day of December, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Circuit Court of the United States, for the Central Division, State of Idaho, in a suit depending in said Court, between said J. C. Mills, Jr., plaintiff, and said American Bonding Company of Baltimore and others, defendants, and numbered 249 on the Register of said Court, a judgment was rendered against the said American Bonding Company of Baltimore and the said American Bonding Company of Baltimore having obtained from said Court a writ of error to reverse the said judgment in the aforesaid suit, and a citation directed to the said J. C. Mills, Jr., citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

Now, the conditions of the above obligation is such, that if the said American Bonding Company of Baltimore shall prosecute the said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else in full force and virtue.

Acknowledged before me the day and year first above written.

AMERICAN BONDING COMPANY OF BALTIMORE,

[Seal] By NEAL & KINYON,
Its Attorneys.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

[Seal] By SHERMAN G. KING,
Its Attorney in Fact.

State of Idaho,
County of Ada,—ss.

On this 2d day of December, 1905, before me, Walter S. Walker, a notary public in and for said county, personally appeared Sherman G. King, known to me to be the person whose name is subscribed to the within instrument, as the attorney in fact of the Fidelity and Deposit Company of Maryland, and acknowledged to me that he subscribed the name of the Fidelity and Deposit Company of Maryland thereto as principal and his own name as attorney in fact.

In testimony whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate above written.

[Seal] WALTER S. WALKER,
Notary Public.

[Endorsed]: No. 249. Bond on Writ of Error. Form of bond and sufficiency of sureties approved. Jas. H.

Beatty, Judge. Filed Dec. 2d, 1905. A. L. Richardson, Clerk.

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Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, District of Idaho, Central Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between American Bonding Company of Baltimore, a corporation, plaintiff in error, and J. C. Mills, Jr., defendant in error, a manifest error hath happened, to the great damage of the said American Bonding Company of Baltimore, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 30th day of December, 1905, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court

of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and five.

[Seal] A. L. RICHARDSON,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, District of Idaho, Central Division.

Allowed by

JAS. H. BEATTY,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 2d day of December, 1905.

Without waiver of any rights in the premises.

W. E. BORAH,

Attorney for Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of Idaho, Central Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] ————————,

Clerk.

United States of America,
District of Idaho,—ss.

I, A. L. Richardson, clerk of the United State Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of writ of error in case of 249, J. C. Mills, Jr., Sheriff, vs. The American Bonding Co., et al., has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have set my hand and affixed the seal of said court in said District this 26th day of January, 1906.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 249. Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division. American Bonding Company of Baltimore, a Corporation, Plaintiff in Error, vs. J. C. Mills, Jr., Late Sheriff of Boise County, Idaho, Defendant in Error. Copy. Writ of Error. Filed Dec. 2, 1905. A. L. Richardson, Clerk.

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Citation.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to J. C. Mills, Jr., Late Sheriff of Boise County, Idaho, Greeting:

You are hereby cited and admonished to be and appear

at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein the American Bonding Company of Baltimore, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. H. BEATTY, United States District Judge for the District of Idaho, Central Division, this 2d day of December, A. D. 1905.

JAS. H. BEATTY,
United States District Judge.

Due service of within citation, by copy, admitted this 2d day of December, A. D. 1905, without waiver of any rights in the premises.

W. E. BORAH,
Attorney for J. C. Mills, Jr., Defendant in Error.

UNITED STATES OF AMERICA—ss.

District of Idaho,—ss.

I, A. L. Richardson, clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of citation in case, No 249, J. C. Mills, Jr., Sheriff, vs. The American Bonding Co., et al., has been

In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division.

J. C. MILLS, JR., Late Sheriff of Boise County Idaho,

Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and the FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,

Defendants.

Notice.

To the Flato Commission Company (a Corporation), and to Messrs. Neal & Kinyon and Messrs. Morrison & Pence, its Attorneys:

You will please take notice that the undersigned, the American Bonding Company of Baltimore (a corporation), desires, and is about to, prosecute proceedings in the above-entitled action, in the matter of a writ of error herein, for a review by the Circuit Court of Appeals of the United States, in and for the Ninth Circuit, of the proceedings heretofore had herein, and desires, and is about to do and perform each and every necessary act of thing whatsoever, in and about the prosecution of such proceedings.

And you are hereby notified to appear in the matter of such proceedings, and to join therein, if you so desire.

Dated August 26th, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,

By JESSE W. LILIENTHAL,
Vice-President.

Due service of the within notice by copy is admitted this 30th day of August, 1905.

NEAL & KINYON,
MORRISON & PENCE,
Attorneys for Flato Commission Company, a Corporation.

[Endorsed] : No. 249. In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division. J. C. Mills, Jr., Late Sheriff of Boise County, Idaho, Plaintiff, vs. American Bonding Company of Baltimore, a Corporation, etc., et al., Defendants. Notice. Filed Sept. 8th, 1905. A. L. Richardson, Clerk.

United States of America,
District of Idaho,—ss.

I, A. L. Richardson, Clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of Notice in Case No. 249, J. C. Mills, Jr., Late Sheriff of Boise Co., Idaho, vs. American Bonding Co. of Baltimore, et al., has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have set my hand and affixed the seal of said court in said District this 12th day of June, 1906.

[Seal] A. L. RICHARDSON,
Clerk.

In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division.

J. C. MILLS, JR., Late Sheriff of Boise Conuty, Idaho,
Plaintiff,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Maryland, and the FLATO COMMISSION COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of Nebraska,
Defendants.

Notice of Intention, etc.

To the Flato Commission Company (a Corporation), and to Messrs. Neal & Kinyon and Messrs. Morrison & Pence, its Attorneys:

You will please take notice that the undersigned, the American Bonding Company of Baltimore, (a corporation), desires, and is about to, prosecute proceedings in the above-entitled action, in the matter of a writ of error herein, for a review by the Circuit Court of Appeals of

the United States, in and for the Ninth Circuit, of the proceedings heretofore had herein, and desires, and is about to do and perform each and every necessary act of thing whatsoever, in and about the prosecution of such proceedings.

And you are hereby notified to appear in the matter of such proceedings, and to join therein, if you so desire.

Dated August 26th, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE,

By JESSE W. LILIENTHAL,
Vice-President.

State of Nebraska,
County of Douglas,—ss.

Joseph R. Wells, of lawful age, being duly sworn, makes oath and says that he served the within notice upon the Flato Commission Company by delivering a true copy thereof to its Secretary, James C. Dahlman, in South Omaha, Nebraska, on the 2d day of October, 1905.

JOSEPH R. WELLS.

Subscribed in my presence and sworn to before me this 2d day of October, 1905.

[Seal] GEO. L. WHITMORE,
Notary Public.

Due service of the within notice by copy is admitted this 2d day of October, 1905.

————————,
Secretary of Flato Commission Co.

[Endorsed] : No. 249. In the Circuit Court of the United States, Ninth Circuit, for District of Idaho, Central Division. J. C. Mills, Jr., Late Sheriff of Boise County, Idaho, Plaintiff, vs. American Bonding Company of Baltimore, a Corporation, etc., et al., Defendants. Notice of Intention, etc. Filed Oct. 14, 1905. A. L. Richardson, Clerk.

United States of America,
District of Idaho,—ss.

I, A. L. Richardson, Clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of Notice of Intention, etc., in case No. 249, J. C. Mills Jr., Late Sheriff of Boise Co., Idaho, vs. American Bonding Co., et al., has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have set my hand and affixed the seal of said Court in said District this 12th day of June, 1906.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1321. United States Circuit Court of Appeals for the Ninth Circuit. American Bonding Company of Baltimore, a Corporation, vs. J. C. Mills, Jr., Late Sheriff of Boise County, Idaho. Certified Copies of Notices to Appear, etc.

Filed Jun. 15, 1906.

F. D. MONCKTON,
Clerk.